153 US 39

RECORD, CASE No. 14,384.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

TERM No., ~~588~~. 332

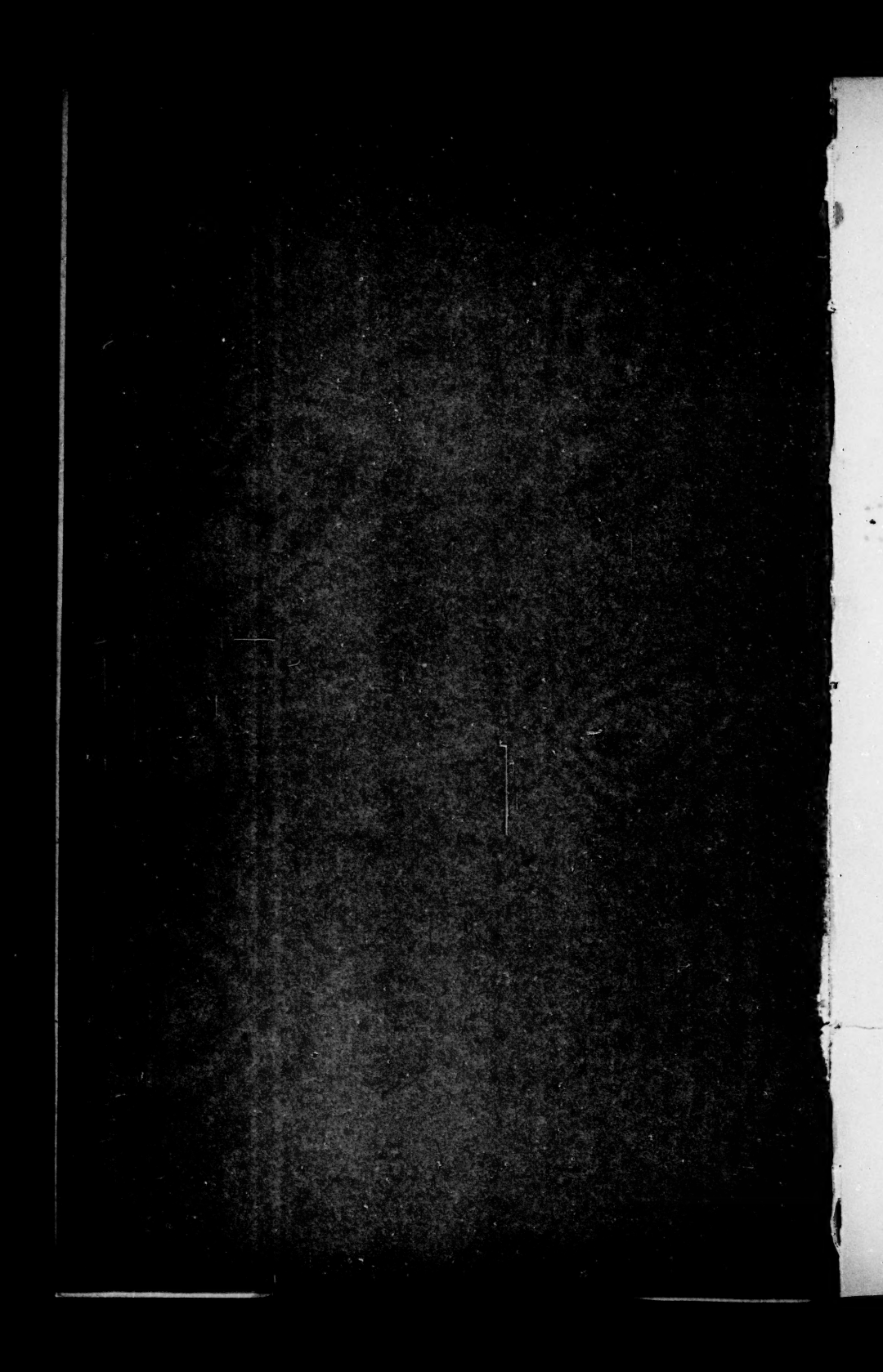
S. D. WILSON, TREASURER OF ROUTT COUNTY, PLAINTIFF IN ERROR,

vs.

THE HALEY LIVE STOCK COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO.

FILED OCTOBER 27, 1890.



RECORD, CASE No. 14,384.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

TERM No., 588.

S. D. WILSON, TREASURER OF ROUTT COUNTY, PLAINTIFF IN ERROR,

vs.

THE HALEY LIVE STOCK COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO.

INDEX.

	Original.	Print.
Caption	1	1
Complaint	1	1
Note as to summons	3	2
Answer of Wilson *et al.*	3	2
Answer of Iles *et al.*	6	4
Replication	8	6
Order: Trial commenced	9	6
Order: Trial continued	10	7
Order: Trial continued	11	7
Order: Trial continued, verdict	11	8
Order: Motion for new trial denied	12	8
Judgment	13	9
Order: Bill of exceptions to be filed in 30 days	14	9
Bill of exceptions	14	10
Index (omitted in printing)	14	10
Exhibit P 1—Articles of incorporation of the Haley Live Stock Company	16	10

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., AUGUST 22, 1892.

	Original.	Print.
Exhibit P 2—Sec. 1064, Laws of Iowa	19	13
P 3—Statutes of Iowa (not set out)	19	13
P 4—Receipt for taxes	20	14
Testimony of Ora Haley	20	15
Exhibit P 5—Haley's tax-list, 1884	29	21
P 6—Haley's taxes, 1884	36	22
P 7—Copy of treasurer's roll	41	25
P 8—Copy of treasurer's roll	45	27
D 1—Copy of affidavit on replevin	61	39
D 2—Record in Kinney *vs.* Breeze	65	42
Testimony of Wilson Rankin	93	65
John A. Tourtelotte	100	71
E. Nuckalls	103	74
S. S. Green	106	76
Reed Matthews	110	79
Francis X. Aicher	111	79
W. J. Wilson	116	82
J. C. McKay	119	85
J. C. Kittell	121	87
John A. Coulter	122	88
Exhibit P 10 (not set out)	139	100
P 11—Haley's assessment-roll, 1884	139	101
Demurrer to plaintiff's evidence, &c.	141	102
Testimony of Samuel D. Wilson	145	104
Exhibit D 3—Copy of treasurer's roll	148	105
D 4—Copy of tax schedule	157	111
P 5—Letter, Haley to commissioners, June 27, 1884	166	120
P 6—Letter, Haley to commissioners, Oct. 3, 1884	167	121
D 7—Letter (not set out)	168	122
Testimony of T. H. Iles	171	124
Lewis H. Breeze	173	125
John M. Breeze	180	130
Lewis H. Breeze (recalled)	186	135
Ora Haley (recalled)	187	136
Frank X. Aicher (recalled)	193	140
Instructions asked by defendant	196	142
Instructions given	198	143
Exceptions to charge	200	145
Verdict	202	148
Motion for new trial	202	148
Judge's certificate to bill of exceptions	208	152
Order: Execution stayed 30 days	209	152
Order: Writ of error to issue	209	153
Writ of error	211	153
Return	212	154
Citation	213	155
Proof of service	214	155
Bond on writ of error	215	156
Assignment of errors	221	160
Order to attach amendments to bill of exceptions	225	163
Clerk's certificate	226	164

1 Pleas in the circuit court of the United States for the district of Colorado, sitting at Denver.

Be it remembered that heretofore and on, to wit, the 24th day of October, A. D. 1888, came the Haley Live Stock Company, a corporation, by W. T. Hughes, its attorney, and filed in said court its complaint and sued out of and under the seal of said court a writ of summons against S. D. Wilson, Thomas H. Iles, S. H. Tharp, Louis H. Breeze, Lemuel L. Breeze, and John M. Breeze, and the said complaint is in words and figures as follows, to wit:

Complaint.

UNITED STATES OF AMERICA:

In the Circuit Court of the United States for and in the District of Colorado.

THE HALEY LIVE STOCK COMPANY, a Corporation, Plaintiff,
vs.
S. D. WILSON, THOMAS H. ILES, S. H. THARP, LOUIS H. BREEZE, LEMUEL L. BREEZE, JOHN M. BREEZE, Defendants.

Plaintiff complains and alleges—

1. That it is a corporation organized and existing under and in pursuance of the laws of the State of Iowa, having its principal office at Council Bluffs, in said State.

2. That each of the defendants, to wit, S. D. Wilson, Thomas H. Iles, S. H. Tharp, Lewis H. Breeze, Lemuel L. Breeze, and John M. Breeze, are citizens of the State of Colorado.

3. That the amount in controversy exceeds two thousand dollars.

2 4. That the Christian names of said Tharp and of said Wilson are unknown to plaintiff; wherefore it asks that when the same are known and certain that it be allowed to amend by inserting the full name of these defendants.

5. That on or about July 27th, 1888, the defendants by force and arms seized and took from the plaintiff about seven hundred head of beef cattle, which were bunched up and were being driven to market by plaintiff, and that after seizing and taking from plaintiff said cattle defendants drove said cattle great distances and kept them bunched together and greatly injured said cattle and caused them to deteriorate and lose flesh until, on August 21st, 1888, plaintiff was compelled to pay defendants a sum demanded by them of plaintiff, to wit, twelve thousand seven hundred and twenty-five dollars and fifty cents ($12,725.50), as a condition precedent to defendants surrendering possession of said cattle to plaintiff.

6. That in order to secure possession of said cattle this plaintiff was compelled to pay defendants the sum last aforesaid.

7. That defendants greatly injured said cattle, and that the in-

jury done to them was at least ten thousand five hundred dollars ($10,500.00), as plaintiff verily believes.

8. That plaintiff was put to great expense and delay in looking after, hunting up, and regaining possession of said cattle, and in the premises was damaged at least five hundred dollars ($500.00), as *he* verily believes.

Wherefore plaintiff asks for judgment for $23,725.50 *dollars*, together with interest from August 21st, 1888, upon $12,725.50 of said sum at the rate of ten per cent. per annum and for costs of suit.

By W. T. HUGHES,
Att'y for Plaintiff.

L. C. ROCKWELL, *Of Counsel.*

3 (Indorsed:) 2340. In the cir. c't of the U. S. The Haley Live Stock Co. *vs.* S. D. Wilson *et al.* Complaint. Filed Oct. 24, 1888. William A. Willard, clerk. W. T. Hughes, attorney for plaintiff.

NOTE.—Summons not returned.

WILLIAM A. WILLARD, *Clerk.*

And afterwards and on, to wit, the 8th day of December, A. D. 1888, came the said defendants, S. D. Wilson and Lewis H. Breeze, by Dan'l E. Parks, John M. Breeze, and H. B. Johnson, their attorneys, and filed in said court and in said cause their separate answer to the complaint heretofore filed herein, and the said answer is in words and figures as follows, to wit:

Answer: Wilson and L. H. Breeze.

UNITED STATES OF AMERICA, *District of Colorado,* } *ss:*

In the Circuit Court of said District.

THE HALEY LIVE STOCK COMPANY, Plaintiff,
v.
S. D. WILSON *et al.*, Defendants.

Now, at this day, come S. D. Wilson and Lewis H. Breeze, and for answer to the complaint in the above-entitled cause deny that plaintiff is a corporation organized or existing under or in pursuance of the laws of the State of Iowa or elsewhere; deny that they or either of them ever seized or took from the plaintiff about seven hundred or any other number of cattle, or that after seizing or taking from plaintiff said or any cattle defendants or either of them drove
4 said or any cattle great or any distance or kept them bunched together or greatly injured said or any cattle or caused them to deteriorate or lose flesh; deny that plaintiff was compelled to pay or did pay these defendants or either of them the sum of $12,725.50 or any other sum as a condition precedent or otherwise to defendants or either of them surrendering possession of said or any cattle

to plaintiff; deny that in order to secure possession of said or any cattle plaintiff was compelled to pay or ever did pay defendants or either of them the sum last aforesaid or any other sum; deny that defendants or either of them greatly or in any manner or degree injured said or any cattle or that any injury done to them was $10,500 or any other sum; deny that plaintiff was put to great or any other expense or delay in looking after, hunting up, or regaining possession of said or any cattle or that in the premises it was damaged $500 or any other amount.

And defendants, for further answer to said complaint, allege that at all times mentioned in the said complaint the defendant S. D. Wilson was the duly elected, qualified, and acting treasurer of Routt county, in the State of Colorado, and defendant Lewis H. Breeze at all such times was in the employment and acting by the authority of the said treasurer; that at all such times said treasurer held a valid tax-list and warrant against one Ora Haley for the said sum of $12,725.50 for taxes that had been assessed upon the property of said Haley for the year A. D. 1884 and interest, penalties, and costs thereon, as by the tax-roll on file in the office of said treasurer more fully appears; that by said tax-list and warrant said treasurer was in substance commanded to make the said sum of $12,725.50 out of the personal property of the said Ora Haley within said county of Routt; that under and by virtue of said tax-list and warrant these defendants, as said treasurer and his employee as aforesaid and not otherwise, made distraint of certain cattle of the character and description of those mentioned and described in said complaint and took the same into custody, which defendants believe to be the cattle referred to in said complaint, and that the levy, distraint, taking, and detention as aforesaid constitute the supposed wrongful taking in the complaint alleged; that the said cattle destrained, levied on, and detained as aforesaid were at the time of said levy, distraint, and taking in possession as aforesaid the property and in the possession of the said Ora Haley, and a large portion of them were the identical property upon which said tax of 1884 was assessed; that said cattle were detained and held in possession by said treasurer from July 27, 1888, to August 21, 1888, when the said Ora Haley voluntarily paid the amount due said county as aforesaid and received his said cattle; that during said period said treasurer was prevented from making sales of said cattle according to law by writs of injunction served upon him at the instance of said Haley; that during said period said cattle were properly cared for and were in better condition when turned over to said Haley than they were when in possession by defendants aforesaid.

Wherefore defendants ask judgment.

JOHN M. BREEZE,
DAN'L E. PARKS, &
H. B. JOHNSON,
Attorneys for Defendants.

(Indorsed:) No. 2340. U. S. circuit c't. The Haley Live Stock Company *vs.* S. D. Wilson *et al.* Separate answer of S. D. Wilson and Lewis H. Breeze. Filed Dec. 8, 1888. William A. Willard, clerk. Dan'l E. Parks, John M. Breeze, H. B. Johnson, att'ys for defendants.

And afterwards and on, to wit, the 8th day of December, A. D. 1888, came the said defendants, Iles, Tharp, L. L. Breeze, and
6 J. M. Breeze, by Dan'l E. Parks, John M. Breeze, & H. B. Johnson, their attorneys, and filed in said court and in said cause their separate answer to the complaint heretofore filed herein, and the said answer is in words and figures as follows, to wit:

Answer: Iles, Tharp, L. L. Breeze, and J. M. Breeze.

UNITED STATES OF AMERICA, *District of Colorado,* } *ss:*

In the Circuit Court of said District.

THE HALEY LIVE STOCK COMPANY, Plaintiff,
v.
S. D. WILSON *et al.*, Defendants.

Now, at this day, come Thomas H. Iles, S. H. Tharp, Lemuel L. Breeze, and John M. Breeze, and for answer to the complaint in the above-entitled cause deny that plaintiff is a corporation organized or existing under or in pursuance of the laws of the State of Iowa or elsewhere; deny that they or any of them ever seized or took from the plaintiff about seven hundred or any other number of cattle, or that after seizing or taking from plaintiff said or any cattle defendants or any of them drove said or any cattle great or any distance or kept them bunched together or greatly injured said or any cattle or caused them to deteriorate or lose flesh; deny that plaintiff was compelled to pay or did pay these defendants or either of them the sum of $12,725.50 or any other sum as a condition precedent or otherwise to defendants or any of them surrendering possession of said or any cattle to plaintiff; deny that in order to secure possession of said or any cattle plaintiff was compelled to pay or ever did pay defendants or any of them the sum last aforesaid or any other sum; deny that defendants
7 or any of them greatly or in any manner or degree injured said or any cattle, or that any injury done to them was $10,500 or any other sum; deny that plaintiff was put to great or any expense or delay in looking after, hunting up, or regaining possession of said or any cattle, or that in the premises it was damaged $500 or any other amount.

And defendants, for further answer to said complaint, allege that at all times mentioned in the said complaint the defendant S. D. Wilson was the duly elected, qualified, and acting treasurer of Routt county, in the State of Colorado; that at all said times said treas-

urer held a valid tax-list and warrant against one Ora Haley for the said sum of $12,725.50 for taxes that had been assessed upon the property of said Haley for the year A. D. 1884 and interest, penalties, and costs thereon, as by the tax-roll on file in the office of said treasurer more fully appears; that by said tax-list and warrant said treasurer was in substance commanded to make the said sum of $12,725.50 out of the personal property of the said Ora Haley within said county of Routt; that under and by virtue of said tax-list and warrant said treasurer as aforesaid and not otherwise made distraint of certain cattle of the character and description of those mentioned and described in said complaint and took the same into custody, which defendants believe to be the cattle referred to in said complaint, and that the levy, distraint, taking, and detention as aforesaid constitute the supposed wrongful taking in the complaint alleged; that the said cattle distrained, levied on, and detained as aforesaid were at the time of said levy, distraint, and taking in possession as aforesaid the property and in the possession of the said Ora Haley, and a large portion of them were the identical property upon which said tax of 1884 was assessed; that said cattle were detained and held in possession by said treasurer from July 27, 1888, to August 21, 1888, when the said Ora Haley voluntarily paid the amount due said county as aforesaid and received his said cattle; that during said period said treasurer was prevented from making sale of said cattle according to law by writs of injunction served upon him at the instance of said Haley; that during said period said cattle were properly cared for and were in better condition when turned over to said Haley than they were when taken in possession by defendant- aforesaid.

8

Wherefore defendants ask judgment.

JOHN M. BREEZE,
DAN'L E. PARKS, AND
H. B. JOHNSON,
Attorneys for Defendants.

(Indorsed:) No. 2340. U. S. circuit c't. The Haley Live Stock Company *vs.* S. D. Wilson *et al.* Separate answer of Thomas H. Iles, S. H. Tharp, Lemuel L. Breeze, & John M. Breeze. Filed Dec. 8, 1888. William A. Willard, clerk. Dan'l E. Parks, John M. Breeze, & H. B. Johnson, attorneys for defendants.

And afterwards and on, to wit, the 22nd day of December, A. D. 1888, came again the said plaintiff, by its attorney aforesaid, and filed in said court and in said cause its replication to the answers heretofore filed herein, and the said replication is in words and figures as follows, to wit:

Replication.

In the United States Circuit Court, District of Colorado.

9 HALEY LIVE STOCK COMPANY
vs.
WILSON *et al.* } 2340

Plaintiff for reply—

Denies defendant Wilson held a valid tax warrant or was executing a valid tax warrant.

Denies said Ora Haley owned said Routt county any tax for the year 1884 or upon any assessment for the year 1884.

Denies any assessment was made against the property of Ora Haley for the year 1884.

By W. T. HUGHES,
Att'y for Pl'ff.

(Indorsed:) 2340. Haley Live Stock Company *vs.* S. D. Wilson *et al.* Reply. Filed Dec. 22, 1888. William A. Willard, clerk.

And afterwards and on, to wit, the 24th day of January, A. D. 1890, the same being one of the regular juridical days of the November term, A. D. 1889, of said court—present, the Honorable Moses Hallett, district judge—the following proceeding was had and entered of record in said court and in said cause, to wit:

Order: Trial Commenced.

THE HALEY LIVE STOCK COMPANY.
vs.
S. D. WILSON, THOMAS H. ILES, S. H. Tharp, Louis H. Breeze, Lemuel L. Breeze, and John M. Breeze. } 2340. Action for Damages.

At this day comes the said plaintiff, by W. T. Hughes, Esq., its attorney, and the said defendants, by H. B. Johnson, Esq., their attorney, also come.

10 And thereupon comes a jury, to wit, Kenneth Matheson, Rufus Gray, T. H. Gist, E. J. Boobier, William Jones, Edward S. Blake, J. F. Locke, A. M. Morrison, Robert Glassey, F. H. Bradley, John Harvey, George J. Kindel, twelve good and lawful men, and they are duly selected and tried, impaneled, and sworn to well and truly try the issues herein joined and a true verdict render according to the evidence.

And thereupon comes the evidence, the hearing of which is continued until the hour of adjournment.

And the said jurors, being now each duly cautioned by the court not to converse among themselves or with others touching this cause or the matters at issue herein or the evidence heard or any part thereof nor to listen to such conversation of others, are permitted to retire to meet the court at its next incoming.

And afterwards and on, to wit, the 25th day of January, A. D. 1890, the same being — of the regular juridical days of the November term, A. D. 1889, of said court—present, the Honorable Moses Hallett, district judge—the following further proceeding was had and entered of record in said court and in said cause, to wit:

Order: Trial Continued.

THE HALEY LIVE STOCK COMPANY *vs.* S. D. WILSON, THOMAS H. ILES, *et al.* } 2340. Action for Damages.

At this day come again the said parties, by their attorneys respectively, and, the said jurors being now all here present and in the jury-box, the trial herein is resumed and continued to the hour of adjournment.

And the said jurors, being now each duly cautioned by the court not to converse among themselves or with others touching this cause or the matters at issue herein or the evidence heard or any part thereof nor to listen to such conversation of others, are permitted to retire to meet the court at its next incoming.

11 And afterwards and on, to wit, the 27th day of January, A. D. 1890, the same being one of the regular juridical days of the November term, A. D. 1889, of said court—present, the Honorable Moses Hallett, district judge—the following further proceeding was had and entered of record in said court and in said cause, to wit:

Order: Trial Continued.

THE HALEY LIVE STOCK COMPANY *vs.* S. D. WILSON, THOMAS H. ILES, *et al.* } 2340. Action for Damages.

At this day come again the said parties, by their attorneys respectively, and, the said jurors being now all here present and in the jury-box, the trial herein is resumed and continued to the hour of adjournment.

And the said jurors, being now each duly cautioned by the court not to converse among themselves or with others touching this cause or the matters at issue herein or the evidence heard or any part thereof nor to listen to such conversation of others, are permitted to retire to meet the court at its next incoming.

And afterwards and on, to wit, the 28th day of January, A. D. 1890, the same being one of the regular juridical days of the November term, A. D. 1889, of said court—present, the Honorable Moses Hallett, district judge—the following further proceeding was had and entered of record in said court and in said cause, to wit:

Order: Trial Continued; Verdict.

THE HALEY LIVE STOCK COMPANY
vs.
S. D. WILSON, THOMAS H. ILES, *et al.* } 2340. Action for Damages.

At this day come again the said parties, by their attorneys respectively, and, the said jurors being now all here present and in the jury-box, the trial herein is resumed.

12 And the said jurors, having heard the evidence produced herein and the instructions of the court, retire to their room under charge of a sworn bailiff to consider of their verdict; and afterwards and on this day come again the said jurors, and on their oaths do say as to defendant Wilson they find for the plaintiff in the sum of $5,266.92, and *we* find the issue for others of the said defendants.

And afterwards and on, to wit, the 8th day of March, A. D. 1890, the same being one of the regular juridical days of the November term, A. D. 1889, of said court—present, the Honorable Moses Hallett, district judge—the following further proceeding was had and entered of record in said court and in said cause, to wit:

Order: Motion for New Trial Denied.

THE HALEY LIVE STOCK COMPANY
vs.
S. D. WILSON *et al.* } 2340. Action for Damages.

At this day comes the said plaintiff, by W. T. Hughes, Esq., its attorney, and the said defendants, by H. B. Johnson, Esq., their attorney, also come.

And the motion for a new trial herein having heretofore come on to be heard and having — argued by counsel and by the court taken under advisement, and the court being now sufficiently advised in the premises, it is ordered by the court, for good and sufficient reasons to the court appearing, that the said motion be denied.

Wherefore it is considered by the court that judgment be entered upon the verdict of the jury herein in favor of the said plaintiff and against the said defendant Wilson for the said sum of five thousand two hundred and sixty-six dollars and ninety-two cents ($5,266.92) and the said plaintiff's costs, to be taxed.

13 It is further ordered by the court that one-half of the cost of the trial of this cause and cause number 2341 between the said plaintiff and The Board of County Commissioners of the County of Routt, tried together by the same jury, be taxed as costs in this case.

And thereupon and on the same day, to wit, the 8th day of March, A. D. 1890, judgment was duly entered against the said defendant

in the judgment book of said court, in pursuance of the statutes and rules of court, in words and figures as follows, to wit:

Judgment.

THE HALEY LIVE STOCK COMPANY
vs.
S. D. WILSON, THOMAS H. ILES, S. H. THARP, Louis H. Breeze, Lemuel H. Breeze, and John M. Breeze.
} 2340. Action for Damages.

On this 8th day of March, A. D. 1890, the same being one of the regular juridical days of the November term, A. D. 1889, of said court, there being present the Honorable Moses Hallett, district judge—

It is considered by the court that the said plaintiff do have and recover of and from the said defendant, S. D. Wilson, treasurer of the county of Routt, five thousand two hundred and sixty-six dollars and ninety-two cents ($5,266.92), its damages by occasion of the premises in its complaint mentioned in form aforesaid assessed and its costs by it in this behalf laid out and expended, to be taxed, and have execution therefor.

And afterwards and on, to wit, the 11th day of March, A. D. 1890, the same being one of the regular juridical days of the November term, A. D. 1889, of said court—present, the Honorable Moses Hallett, district judge—the following further proceeding was had and
14 entered of record in said court and in said cause, to wit:

Order: Bill of Exceptions in 30 Days.

THE HALEY LIVE STOCK COMPANY
vs.
S. D. WILSON *et al.*
} 2340. Action for Damages.

At this day come the said defendants, by D. E. Parks, Esq., their attorney, and on their motion day until thirty days from this day is allowed the said defendants within which time to file a bill of the exceptions reserved by them upon the trial of the issues herein joined.

And afterwards and on, to wit, the 15th day of April, A. D. 1890, came again the said defendants, by their attorneys aforesaid, and filed in said court and in said cause their bill of the exceptions reserved by them upon the trial of the issues herein joined.

And the said bill of exceptions is in words and figures as follows, to wit:

Bill of Exceptions.

(Index to bill of exceptions omitted here in printing. See general index.)

15 UNITED STATES OF AMERICA, *District of Colorado,* } ss:

In the Circuit Court of the United States within and for said District of Colorado.

THE HALEY LIVE STOCK COMPANY, Plaintiff,
vs.
SAMUEL D. WILSON *et al.*, Defendants. } No. 2340.

Appearances: For plaintiff, W. T. Hughes, Esq.; Willard Teller, Esq.; for defendants, J. M. Breeze, Esq.; H. B. Johnson, Esq.; D. E. Parks, Esq.

16 *Bill of Exceptions.*

Be it remembered that on the trial of the above cause at the November, A. D. 1889, term of said court, and on, to wit, the 24th day of January, A. D. 1890, a jury having been duly empaneled, the following proceedings were had—that is to say:

The court ruled that the above cause should be tried at the same time and with the case numbered 2341, entitled The Haley Live Stock Company against The Board of Commissioners of Routt County, Colorado, and that the jury should return their verdict in both causes at the same time; and thereupon the plaintiff, to maintain the issues on its part, offered in evidence the articles of incorporation of the Haley Live Stock Company.

Mr. JOHNSON: We object to the articles of incorporation on the ground that they were filed in the office of the secretary of state on the 29th day of August, 1888, and that this alleged trespass was alleged to have been committed upon July 27th, 1888, over a month previous. The court overruled said objection and received said document in evidence. The said paper is marked Exhibit P 1 and is in words and figures following:

UNITED STATES OF AMERICA, *State of Iowa.* }

I, Frank D. Jackson, secretary of state of the State of Iowa, do hereby certify that the attached instrument of writing is a true and correct copy of the articles of incorporation of the Haley Live Stock Company of Council Bluffs, Iowa, filed Aug. 29th, A. D. 1888, as the same appears of record in this office.

In testimony whereof I have hereunto set my hand and affixed the seal of the secretary of state of the State of Iowa.

Done at Des Moines, the capital of the State, this 17th day of Octo-

ber, in the year of our Lord one thousand eight hundred and eighty-nine, of the Independence of the United States the one hundred and fourteenth, and of the State of Iowa the forty-third.

[Seal of Iowa.]

FRANK D. JACKSON,
Secretary of State of the State of Iowa,
By C. S. BYRKIT, *Deputy.*

17 Haley Live Stock Company.

Articles of Incorporation.

Know all men that we, Ora Haley, of the county of Albany and Territory of Wyoming, and Samuel Hass, of the county of Pottawattamie and State of Iowa, have and do hereby associate ourselves for the purpose of becoming a body corporate under the laws of the State of Iowa and under the name, with the powers, and for the purposes herein expressed.

Article I.

The name and style of this corporation shall be Haley Live Stock Company.

Article II.

The object and purpose for which this corporation is formed is to buy, hold, own, and sell ranches and ranch property, and to grow, buy, feed, fatten, and graze, or agist live stock in the States of Iowa and Colorado and the Territory of Wyoming, with power to carry on a general ranch, ranching, and live stock business at either or all of the places aforesaid.

Article III.

The capital stock of this company shall be three hundred thousand dollars, to be divided into three thousand shares of one hundred dollars each, fully paid up and forever non-assessable, each share of said stock to be fully paid to said corporation upon the issuance and delivery thereof.

Article IV.

This corporation shall begin business on the first day of August, 1888, and the term of its corporate existence shall be twenty years unless sooner dissolved, as provided by law, but shall have power of succession.

Article V.

The business of this company shall be under the control of Ora Haley, and he is hereby selected to act as a superintendent of and to manage all the affairs and business concerns of the said company until the first day of January, 1889, when an election of officers shall occur, whose successors are to be annually elected thereafter

as may be hereafter provided by the by-laws of this corporation; but all officers of this corporation shall hold their offiees until their successors are elected and qualified as provided by such by-laws.

Article VI.

The principal place of business of this corporation shall be at Council Bluffs, in the State of Iowa, but it may also do business in the State of Colorado or the Territory of Wyoming and at such places in the said States and Territory as the interest of the business of the said corporation may require.

Article VII.

The aggregate indebtedness of this corporation shall at no time exceed two hundred thousand dollars.

Article VIII.

The private property of the individual members of this corporation shall be exempt from its corporate debts.

Article IX.

The corporation shall have the power to make such by-laws as it may deem proper for the regulation and management of its business affairs and not on conflict with the laws of the State of Iowa.

Witness our hands.

ORA HALEY. [SEAL.]
SAM'L HASS. [SEAL.]

ELSWORTH E. EVANS, *Witness.*

18 TERRITORY OF WYOMING, } ss:
Laramie County, }

Be it remembered that on this 21st day of July, 1888, before me, Ellsworth E. Evans, a notary public within and for said county and the Territory aforesaid, personally appeared Ora Haley, to me personally known to be the identical person who signed and executed the foregoing articles of incorporation as an incorporator, and acknowledged the signing and the execution of the same to be his voluntary act and deed for the uses and purposes therein expressed.

In witness whereof I have hereunto subscribed my name and affixed my seal notarial, at the city of Cheyenne, in the county and Territory aforesaid, on the day and date last above written.

[SEAL.] ELLSWORTH E. EVANS,
Notary Public.

TERRITORY OF WYOMING, } ss:
County of Laramie, }

I, John K. Jeffrey, county clerk in and for said county, do hereby certify that Ellsworth E. Evans, whose name is subscribed to the

proof of acknowledgment of the annexed instrument, was at the time of taking such proof or acknowledgment a notary public within and for said county, duly commissioned, sworn, and acting as such, as appears from his commission on record in this office.

I certify further that I am well acquainted with his handwriting and verily believe that the signature to such proof or acknowledgment is genuine; and, further, that the annexed instrument is executed and acknowledged according to the laws of the Territory of Wyoming.

Witness my hand and the seal of said county hereto affixed at my office, in Cheyenne, this 21st day of July, A. D. 1888.

[SEAL.] JOHN K. JEFFREY,
Clerk of said County and ex Officio Register of Deeds,
By SAM. ATKINSON, *Deputy.*

STATE OF IOWA, } ss:
Pottawattamie County, }

Be it remembered that on this 23rd day of July, 1888, before me, George F. Wright, a notary public, personally came Samuel Hass, to me personally known to be the identical person who signed and executed the foregoing articles of incorporation as an incorporator, and acknowledged the signing and the execution of the same to be his voluntary act and deed for the uses and purposes therein set forth.

In witness whereof I have hereunto subscribed my name and affixed my seal, in the county and State aforesaid, on the day and date last above written.

[SEAL.] GEORGE F. WRIGHT,
Notary Public.

STATE OF IOWA, } ss:
Pottawattamie County, }

Filed for record on the 24th day of July, A. D. 1888, at 4½ o'clock p. m., and recorded in Book 207, page 58, of county records.

W. H. THOMAS, *Recorder.*

THE TERRITORY OF WYOMING, } ss:
Carbon County, }

Filed for record on this 30 day of July, A. D. 1888, at 8
19 o'clock a. m., and recorded in Book L, Miss. Rec., page —.

W. L. EVANS,
County Clerk and ex Officio Register of Deeds.

STATE OF COLORADO, } ss:
Routt County, }

Filed in my office for record Aug. 10, 1888, at 6 p. m., and duly recorded in Book A, page 380.

F. M. JONES, *Recorder.*

STATE OF IOWA, *ss:*

Filed for record in office of secretary of state Aug. 29, A. D. 1888, and recorded in Book Y, page 224.

FRANK D. JACKSON,
Secretary of State,
By C. S. BYRKIT, *Deputy.*

UNITED STATES OF AMERICA, }
State of Iowa. }

I, Frank D. Jackson, secretary of state of the State of Iowa, do hereby certify that Wm. H. Thomas was recorder in and for the county of Pottawattamie, State of Iowa, for the year 1888, as the same appears of record in this office.

In testimony whereof I have hereunto set my hand and affixed the seal of the secretary of state of the State of Iowa.

Done at Des Moines, the capital of the State, this 17th day of October, in the year of our Lord one thousand eight hundred and eighty-nine, of the Independence of the United States the one hundred and fourteenth, and of the State of Iowa the forty-third.

[SEAL OF IOWA.] FRANK D. JACKSON,
Secretary of the State of Iowa,
By C. S. BYRKIT, *Deputy.*

Mr. HUGHES: To obviate that objection of Mr. Johnson we will offer section 1064 of the Incorporation Laws of the State of Iowa.

Said portion of said laws is admitted in evidence and is taken from a certified copy of said laws, which contains, among other sections, said section 1064, and the same is in words and figures following, marked Ex. P 2:

SEC. 1064. The corporation may commence business as soon as the articles of incorporation are filed in the office of the recorder of deeds and their doings shall be valid if the publication in a newspaper is made and the articles filed in the office of the secretary of state within three months from such filing in the recorder's office.

Mr. HUGHES: We also offer in evidence the statutes of the State of Iowa relating to corporations.

Said statutes were received in evidence, marked Ex. P 3,
20 and reference is made to the same.

Mr. HUGHES: We now offer in evidence the receipt for taxes, amounting to $12,725.52, signed by S. D. Wilson, treasurer.

Said paper is admitted in evidence, is marked Exhibit P 4, and is in words and figures following:

Ex. P 4.

YAMPA, ROUTT CO., COLO., *Aug.* 21, 1888.

Received of Wilson Rankin for Ora Haley a certified check of Frank X. Aicher on the German National Bank of Denver, Colo-

rado, for twelve thousand seven hundred and forty-six and $\frac{5}{100}$ dollars ($12,746.05), in full payment of the claim of Routt county, Colorado, against Ora Haley for taxes for the year 1884, interest, and costs and expenses of all attempts of the treasurer to collect the same, amounting to the sum of twelve thousand seven hundred and twenty-five and $\frac{52}{100}$ (12,725.52) dollars. The said certified check being for a larger sum than the amount due, the undersigned, treasurer, has delivered his check as treasurer to said Rankin, payable to the order of Ora Haley, for the sum of twenty and $\frac{53}{100}$ dollars, being the difference between amount due for said taxes for the year 1884 and the amount of the certified check. This payment, it is understood, is paid in full settlement for the taxes of Ora Haley for the year 1884 under protest and to release cattle now distrained for said taxes.

S. D. WILSON,
Treasurer of Routt Co., Colo.

ORA HALEY, the plaintiff, called in his own behalf, being first duly sworn, testified as follows:

Direct examination.

By W. T. HUGHES, Esq.:

Q. What is your name?
A. Ora Haley.
Q. Where do you live?
A. Laramie, Wyoming.
Q. What is your business, Mr. Haley?
A. I am engaged in the stock business and am a cattle-grower.
Q. You have been operating, I believe, in Routt county for some years past?
A. Yes, sir.
Q. You have had a herd of cattle in Routt county?
A. Yes, sir.
Q. Through what years have you had them?
A. Well, I went in there first in the spring of 1880 and 21 have been interested there ever since in that business.
Q. You have a herd of several thousand there now or your company?
A. The Haley Live Stock Company
Q. When was that company incorporated?
A. During the month of July, 1888, it was authorized to do business.
Q. Who was its chief managing officer?
A. I am, sir.
Q. What office do you hold in the company?
A. I am its president and general manager.
Q. Some of your cattle were seized for the alleged tax, were they not, in 1888?
A. Yes, sir.
Q. How many cattle were seized?

A. About seven hundred and forty head.
Q. What kind of cattle?
A. They were beef cattle gathered for the market.
Q. What do mean by "gathered for the market"?
A. They were gathered and put into a bunch together on the road, to a shipping point on the railroad.
Q. Gathered from what?
A. Gathered from the range—from the stock cattle that were ranging; they were sorted out from the balance of the range stock and put into a herd by themselves.
Q. Does your herd consist of many cattle?
A. Yes, sir.
Q. About how many?
A. Somewhere from seven to ten thousand head.
Q. But these beef cattle were gathered from the herd?
A. Yes, sir.
Q. Who gathered them?
A. My foreman with his men.
Q. What was being done with them if they were gathered as beef cattle?
A. They were gathered for the purpose of taking to the railroad and shipping to market.
Q. Were they being moved along about the 27th of July?
22 A. Well, they would have been in the course of an hour from the time they were seized. They were taken there early in the morning before they had moved camp. The boys were on guard, holding the cattle.
Q. You said the cattle were seized. By whom?
A. By S. D. Wilson and his men, L. H. Breeze acting as foreman.
Q. Do you know upon what grounds these cattle were seized?
A. For this alleged tax; to be disposed of, as they claimed.
Q. How long did they detain the cattle?
A. Those cattle were gained possession of again on the 21st or 22nd day of August of that year—the 22nd.
Q. If I understand you right they were seized about the 22nd of July and detained until the 21st or 22nd of August.
A. The morning of the 21st, I think. That was the day they were to have been sold, to the best of my recollection, as per their advertisement.
Q. Did the company again get possession of them in August?
A. On the 22nd day of August.
Q. Do you know upon what terms and conditions?
A. Well, upon its being forced to pay their demands.
Q. Do you remember what those demands were?
A. Yes, sir; it was $12,746, I think. I think there was a little labor of perhaps twenty-odd dollars.
Q. Did you ever hear of that document before or see it?
A. Yes, sir; that is a receipt they made.

(Witness shown Exhibit 4.)

Mr. JOHNSON: We object. It shows for itself. You may read it.

Q. You have seen that before?
A. Yes, sir.
Q. What is it, briefly?
A. It is a receipt from S. D. Wilson, drawn by John M. Breeze, county attorney at that time, for the payment of this money that I have mentioned—$12,725.
Q. That was paid?
A. Paid at that time by my foreman.
23 Q. You said this was John Breeze's writing?
A. I recognize this as his handwriting.
Q. Are you acquainted with his writing?
A. Yes, sir.
Q. Do you think this is in his handwriting?
A. I know it is, and Mr. Wilson's signature.
Q. Where were the cattle on the 22nd of August, when the company got possession of them again?
A. They were on the Bear river, in Routt county.
Q. How far from where they were first seized by Wilson?
A. I would think about forty miles.
Q. In the direction of the station—the shipping station?
A. No, sir; that much farther from the railroad.
Q. They were that much farther from the railroad?
A. Yes, sir.
Q. As I understand, Mr. Haley, you have been — the cattle business several years?
A. Yes, sir.
Q. You are still handling range cattle?
A. I think I am.
Q. Raising and gathering and shipping to market?
A. Yes, sir.
Q. What effect would the seizing of that number of cattle and keeping them guarded for that length of time have upon the cattle?
A. Well, it would result in quite a shrinkage, to beef cattle especially.
Q. Explain why that would result.
A. Well, in handling and gathering cattle from a range—that is, range raised, where they are used to having their liberty—and the moment you commence herding them they become dissatisfied and uneasy, and they do not thrive. If you gather a bunch of cattle that are raised on the range, whose habits are always to have liberty, and shut them up in pasture, where feed is not so good, they will shrink, and as to their being held by men around them they will shrink much faster. It is unnatural to their habits.
Q. Then, in your judgment, cattle will shrink held as these
24 cattle were?
A. I know it.
Q. Well, would it have any other effect upon the animal, aside from shrinkage? Would it have any indirect result?
A. Well, the indirect results would be in the depreciation in the balance of the carcass.
Q. Do I understand that it would deteriorate the animal for beef?

A. Yes, sir; if the animal shrinks fifty pounds it depreciates the balance of the carcass, because it is the fat that is lost that makes the quality of the animal—that is, the animal that might be fit for beef would be worth one value, while the shrinkage of seventy-five pounds or one hundred pounds would make it unfit for beef, and it would have another value, which would be much less.

Q. Then I understand you that it would not only directly but indirectly affect the animal.

A. Yes, sir.

Q. The animal's value for beef?

A. Yes, sir.

Q. How was the market in July, 1888?

A. Well, it was very buoyant and looked very bright and encouraging, while the markets previously had been depressed somewhat, but it took quite a boom in July and early in August, and shrunk during the month of August again from heavy receipts of cattle, and dropped right back to a low price again in September.

Q. What markets did you ship to?

A. Omaha and Chicago.

Q. You ship, I believe, by train-loads to those points?

A. Yes, sir.

Q. Then I understand that the market of that year was better in July than it was later?

A. It always is.

Q. Do you mean it is as a general rule?

A. There is no exception that I ever knew, and I have been shipping cattle to market for eighteen years to Chicago and Omaha, Chicago particularly. It is the time between the times that the corn-fed cattle in the States are about used up and consumed
25 and the time that the range cattle come on the market to take their place, and later receipts are very heavy when everything comes off of the range. Everybody is shipping, and I make no exception to the rule.

Q. What do you recollect of the market in August of that year—the latter part of August?

A. I recollect that there was quite a depreciation in values on the market. The market went off quite considerable.

Q. Do you say that you lost any by reason of not being able to sell your cattle in what you call the July market or the first of August market?

A. Certainly; that is just what I mean.

Q. How much do you remember you lost on them—on that herd of cattle—by not being able to sell during the early days of August in that year?

A. Well, I should certainly estimate it at not less than ten thousand dollars.

Q. Now, you said something about seven hundred head of cattle. Can you name exactly the number of head of cattle that was gathered?

A. My foreman reported to me that he had seven hundred and

forty-three head. That is my recollection, that that was the actual count.

Q. When were these cattle marketed?

A. They were marketed immediately after gaining possession in August; the 22nd of August we regained them and they were immediately removed to the railroad and shipped. They were moved very hurriedly, and in consequence of their shrinking so rapidly they were sold in the market, part of them in Omaha on September 1st and the remainder in Chicago on September 3rd, with the exception of about one hundred head that in consequence of the shrinkage had to be cut out and dropped upon the range again—from seventy-five to one hundred; I should say about one hundred.

Q. How many men were employed in gathering those cattle and moving them to market?

A. Well, ten or twelve men.

26 Q. Well, which do you think? Give it exactly. Which number, if you know?

A. That is the number of men I usually employ in my outfit; ten or twelve handle a bunch of cattle on the range and do the range work.

Q. But who, as I understand it, had possession of the cattle on the 27th of July?

A. Yes, sir.

Q. What did these men do after these cattle were seized and taken from them?

A. Well, for some days they were waiting around in idleness and in readiness, expecting possession of the cattle to be immediately regained. They were waiting in readiness to take them and go on to the railroad and take them to market.

Q. Then the company suffered some loss by reason of them?

A. Why certainly; they suffered the expense of this outfit being idle.

Q. To what extent?

A. Well, I was paying my cowmen forty dollars a month. I was paying my cook forty-five dollars per month and my foreman one hundred and twenty-five dollars a month, and it costs fifty cents per day to board them; and my horses and everything were in comparative idleness for, it must have been, two weeks.

Q. In the way of figures about how much do you estimate the loss to the company by reason of having these idle men upon hands while these cattle were being held by Mr. Wilson?

A. I thought about twenty-five dollars per day.

Q. Does that include you- horses?

A. No, sir; no allowance for horses; just the money that I would be paying out for the men that were in idleness.

Q. Is there any other item of expense that you can think of or item of loss resulying from the seizure of the cattle?

A. The damage to these cattle I have not explained.

Q. Any other item, if you please; did you make any efforts to regain these cattle?

A. O, yes.

27 Q. Were you at any other expense in that direction?

A. Yes, sir; I was. I came here to the courts for injunctive relief and a replevin also.

Q. Well, roughly speaking, what would you estimate all the damages in the way of trying to regain the property and getting possession of them?

A. In that item of expense, the traveling back and forth and attorney fees, was not less than five hundred dollars, as it is a long distance from here to where the cattle were when this trouble arose.

Q. Now, you may return to the damages which you think you suffered by reason of the seizure of these cattle or anything additional you desire.

A. Well, I think these cattle shrank at least one hundred pounds per head, anyway, and I think there was a depreciation in the market of fifty cents per hundred during the time these cattle were detained—in the market where these cattle were destined to be shipped—and I think the depreciation in the balance of the carcass in consequence of this shrinkage of one hundred pounds was not less than twenty-five cents per hundred on the remainder of the carcass, and there was somewhere from seventy-five to one hundred head of cattle that became unfit for the market in consequence of this holding that I had to cut out and leave on the range. They were not fit for market that season at all; the last year being a very dry season, they never made any beef cattle. I have the identical cattle now, or a good many of them, down in Nebraska feeding with corn; so there was a shrinkage of one-half of the value of those seventy-five or one hundred head of cattle that had to be cut out.

Q. Mr. Haley, I believe you have some documents which I gave you at the office, and I wish you would let me have them. (Witness produces papers.) Mr. Haley, are you acquainted with
28 the amount claimed by the county from you for taxes for 1884? Do you know?

A. Well, I know very near.

Q. Did you ever see that document? (Hands to witness.)

A. Well, I have seen it, or one just like it.

Q. This is a certified copy of an assessment-roll, is it not, by the clerk and recorder of Routt county?

A. That is certified to by R. G. Voice, clerk and recorder of Routt county.

Q. Did you ever see the original record from which that was taken?

A. Yes, sir.

Q. You have seen the original record?

A. Yes, sir.

Q. I believe you say you saw that copy before?

A. Yes, sir.

Q. With that in your hands can you state the amount of taxes that was demanded by Routt county off of you for the year 1884?

Mr. JOHNSON: We object. The paper speaks for itself.

The COURT: I think the paper ought to be used for that purpose.

A. No, sir; I cannot state.

Q. Mr. Haley, have you any personal recollection of the original record, of which this is a copy, as to whether or not this is a true copy of the original record?

Mr. JOHNSON: We object.

Mr. HUGHES: Probably this will show itself, but I expect the court will permit me to show this, a compared copy, as well as the office copy.

The COURT: The witness can answer.

A. No, sir.

Mr. JOHNSON: The defendant excepts.

Q. Is that a true copy of the original record?

A. No, sir.

Q. What record do you refer to when you say that it is not a true copy of the original record?

A. Well, I mean a true copy of the treasurer's roll.

29 Q. That is one record. Do you understand there is another record?

A. Is not the treasurer's roll supposed to be a copy of the assessor's roll?

Q. No; one is the assessor's roll and the other is the treasurer's roll.

A. I had referred to the treasurer's roll.

Q. Did you ever look at the original assessment-roll?

A. I never saw the original assessor's roll. I have seen the original treasurer's roll.

Said exhibit, which has been shown to witness, is offered in evidence, admitted, and marked Exhibit 5, and is in words and figures following:

(Ex. P 5.)

STATE OF COLORADO, } ss:
County of Routt, }

I, L. H. Breeze, county treasurer in and for Routt county, State of Colorado, do hereby certify that the copies of tax-list of the year 1884, which was sent to W. T. Hughes, Esq., on November 16th, 1887—said tax-list *were* in the handwriting of I. G. Voice, deputy treasurer—covering Ora Haley's tax-list for the year 1884, and preceding and succeeding pages are full, true, and correct copies of said pages of said tax-list.

Given under my hand and seal this 15th day of December, 1887.

L. H. BREEZE, [SEAL.]
Co. Treasurer,
By I. G. VOICE, *Deputy.*

(See tables marked pages 30–35.)

36 Q. Mr. Haley, it has been mentioned here that you have had some litigation in the State courts. That is true?
A. Yes, sir.
Q. You had some in Routt county, did you not?
A. Yes, sir.
Q. And some in Clear Creek county, had you not?
A. Yes, sir.
Q. And some in Aspen, had you not?
A. Yes, sir.
Q. And some in the State supreme court, had you not?
A. Yes, sir.
Q. Did you ever see that document before? (Hands paper to witness.)
A. Yes, sir.

Said paper is offered in evidence, is admitted, and marked Exhibit 6, and is in words and figures following:

(Ex. P 6.)

"*Certified Copy of Treasurer's Books Relating to Ora Haley's Taxes for* 1884. *Filed Feb'y* 12, 1887."

OFFICE OF COUNTY TREASURER, ROUTT COUNTY, COLORADO.

(Parenthesized figures not in the original.)

	(1) County tax.	(2) State tax.	(3) School tax.	(4) Road tax.	(5) State institution tax.	(6) Military poll tax.	(7) County poll tax.	(8) Special school tax.	(9) Stock inspection tax.	(10) Capital building tax.	(11) Interest on county warrants.	(12) Amount of total tax.	(13) Valuation of personal property.	(14) Valuation of lands and improvements.	(15) Value of improvements on public lands.	(16) Total valuation.
Ora Haley.....	$1,751 00	$612 45	$350 20	$875 50	$210 02	.....	.....	.....	$11 67	8,755	$350 20	$4,248 59	$1,705 20	$3,780	$800	$175,100

I hereby certify that the foregoing statement is a true and correct copy of the taxes of Ora Haley, both real and personal, as they appear of record in my office for the year A. D. 1884.

In witness whereof I have hereunto set my hand and seal, as county treasurer of Routt county and State of Colorado, this the 22d day of January, A. D. 1887.

L. H. BREEZE,
County Treasurer of Routt County, Colorado.

38 STATE OF COLORADO, }
County of Jefferson, } *ss:*

I, W. A. Dier, clerk of the district court for and in Jefferson county, Colorado, do hereby certify that at the hearing of the case, Ora Haley *vs.* Lewis H. Breeze, on February 12*d*, 188⁷, said Breeze introduced in evidence a document, of which the above is a full, just, and true copy made by me at the time at the request of Ora Haley.

Witness my hand and official seal this February 12th, 1887.

[Seal District Court Colorado, Jefferson County.]

W. A. DIER, *Clerk.*

39 Q. What document is that?

A. Well, this is supposed to be a copy of the treasurer's book or roll. It was presented in evidence by Louis H. Breeze at a hearing in Golden.

Q. What kind of a hearing?

A. It was on a motion to dissolve an injunction.

Q. At what time?

A. Well, it must have been February 12th, 1887, by this certificate here.

Q. The treasurer's roll, then, as I understand, a certified copy of it, was introduced at that hearing?

A. Yes, sir.

Q Is that a copy of the roll that was introduced there?

Mr. JOHNSON: We object. It might be a copy of what was introduced there and still not be a correct copy.

Mr. HUGHES: We will have to prove that.

The COURT. Proceed.

A. Yes, the copy that was introduced.

Q. Did you compare that copy with the original?

A. With the original that was introduced?

Q. Yes, sir.

A. I did.

Q. And from comparing it with the original, is that a copy of the one that was introduced at Golden? Do you know personally that this is a copy of the official copy that was introduced at Golden?

A. Yes, sir.

Mr. JOHNSON: We object to this line of evidence. The statute provides that any books or papers belonging to the treasurer's office, duly certified by him, shall be evidence. Now they are introducing a copy of some copy. It seems to me that they should have, as the law contemplates, a certified copy of the roll. The treasurer's books and papers are there and they can certify to them.

Mr. HUGHES: There is considerable in his objection, but
40 I am going to say that they introduced four copies in the different trials, and that no two of them were alike; that they fabricated these records and made serious alterations, and that they finally altered the original records themselves, and I am going to show that those records were made up of forgeries or fabrications. Now, then, I have shown that at Golden an office copy was introduced. I have an office copy from the clerk of the court there, but there may be irregularities in the certificates and so on, and I want to prove it either as a compared or sworn copy, to call it right, or as an office copy, a certified copy. I am not bound to go over there. I want to show that at Golden they introduced one kind of copy and at Aspen another.

Mr. JOHNSON: If the court wants to go into the trial of several cases of pretended forgeries, which are as mythical as anything that can be imagined, we can go into a trial of them. The whole thing the gentleman is driving at is this, and a mere statement will show

the folly of it: This assessor, in this assessor's roll, in fixing the amount of valuation, &c., the number of dollars was stated in figures without the dollar-mark before it. Now, the treasurer, under the statute that directs him to do it and under the advice and direction of the county attorney and the statute authorizing the treasurer, at any time after the roll has come into his possession, to make corrections and supply defects, simply inserted in them the dollar-mark before these figures. Now, all of the courts have held and all the recent decisions are to that effect. This dollar-mark was not material, but to make it certain the treasurer inserted the dollar-mark, and that is all the gentleman talks about when he
41 speaks of forgery, and that was done before the roll went into the hands of Mr. Wilson. He is bound to execute the process as it comes from the treasurer. The treasurer turns him over this warrant, corrected as he did correct it, and he executes it. Now, we say that this testimony, even if it was to affect the validity of the roll, could not affect in any manner the liability of Mr. Wilson, who executed the process that was regular and valid on its face.

Mr. HUGHES: Taken from Gen. Johnson's standpoint he is right, but that is not my position here. I am not going to claim that the treasurer changed the assessment-roll, but that the treasurer changed his own roll. He changed the treasurer's roll. It is void because the description of the real estate is simply "6 quarter sections."

The COURT: If the plaintiff alleges that the original record is changed I think he must be at liberty to show how it was changed, and for that purpose I suppose these copies may be competent evidence.

Q. Mr. Haley, did you ever see that document before? (Hands to witness.)

A. Yes, sir.

Q. What document have you in your hands?

A. It is a certified copy of the treasurer's roll.

Said document is offered in evidence, is admitted, and marked Exhibit P 7, and is in words and figures following:

Ex. P 7.

STATE OF COLORADO, }
County of Larimer, } *ss:*

I, Jefferson McAnelly, judge and *ex officio* clerk of the county court of Larimer county, Colorado, hereby certify that the foregoing papers contain a true, full, and perfect copies of the certified
42 copy of the treasurer's books, roll, and list, and warrant as the same appears on file in this office and which was introduced as evidence by the defendant in the case of Ora Haley against Fred. Elliott in a cause lately pending in this court.

Witness my hand and official seal this 24th day of September, A. D. 1887.

[SEAL.] JEFF. McANELLY,
Judge and ex Officio Cl'k.

43 & 44 Name.	Value of personalty.	Value of lands and improvements.	Value of improvements on public lands.	Total valuation.	County tax.	State tax.	School tax.	Road tax.	Interest on Co. warrants.	State institutions.	Capitol.	Stock inspection.	Mill. poll.	Special poll.	Special dist.	School tax, value.	Int. tax.	Total.
	170,520	3,780	800	175,100	1,751 00	612 45	350 20	875 50	350 20	210 02	87 55	11 67	.....	.....	.....	.....	.....	4,248 59

OFFICE OF THE COUNTY TREASURER OF ROUTT COUNTY, COLORADO,
HAHN'S PEAK, COLO., *May* 30, 1887.

I do hereby certify that the foregoing statement and warrant for the collection of taxes for the year A. D. 1884 is a true and correct copy of the entries made upon the tax rolls, list, and books of my office showing the taxes due from Ora Haley for the year A. D. 1884 in the county of Routt and State of Colorado as appears in my office, and the warrant hereto attached is a true and correct copy of the tax warrant attached to said list, roll, and book issued to me as treasurer of said county for the year A. D. 1884.

L. H. BREEZE,
Treas. Routt Co., Colo.

45 STATE OF COLORADO, } ss:
County of Routt, }

HAHN'S PEAK, *Nov.* 1, 1884.

To the treas. of Routt county, Greeting:

You are hereby *and* commanded to collect the foregoing taxes levied by State and county authorities for the year 1884 as required by law, and this shall be your warrant therefor.

Witness my hand and official seal this first day of November, A. D. 1884.

[SEAL.]

C. BRANDEGEE,
County Clerk,
By I. G. VOICE, *Dpt.*

Copied by me from original on file at request of plaintiff.
S. F. DARRAH.

Q. Where did you first see that document?
A. In Fort Collins.
Q. You had a trial there, I believe?
A. Yes, sir.
Q. And that was introduced by L. H. Breeze, was it not?
A. Yes, sir.
Q. Is that a copy of the treasurer's roll?
A. Yes, sir; at a hearing before judge McAnely.
Q. Did you ever see this document? (Hands to witness.)
A. Yes, sir; this I first saw at Aspen.
Q. What document is this?
A. It is a certified copy of the treasurer's roll.

Said document is offered in evidence, is admitted, marked Exhibit "P 8," and is in words and figures following:

(Ex. P 8.)

STATE OF COLORADO, } ss:
County of Routt, }

HAHN'S PEAK, *Nov.* 1, 1884.

To the treasurer of Routt county, Greeting:

46 You are hereby *and* commanded to collect the foregoing taxes levied by State and county authorities for the year 1884 as required by law, and this shall be your warrant therefor.

Witness my hand and official seal this first day of November, A. D. 1884.

C. BRANDEGEE,
County Clerk,
By I. G. VOICE, *Deputy.*

47

Names.	Value of personalty.	Value of land and improvements.	Value of improvements on public land.	Total valuation.	County tax.	State tax.	School tax.	Road tax.	Interest on Co. warrants.	State inst.	Capitol.	Stock insp.	Milit. poll.	Special poll.	No. of dist.	Special school tax.		Total.
																Value.	Am't of tax.	
	Doll.	*Doll.*	*Doll.*	*Doll.*	*Doll. Cts*	*Doll. Cts.*	*Doll. Cts.*	*Doll. Cts.*	*Doll. Cts*	*Doll. Cts*	*Doll. Cts*	*Doll. Cts*	*Doll. Cts.*	*Doll. Cts.*		*Doll.*	*Doll. Cts.*	*Doll. Cts.*
Haley, Ora	170,520	3,780	800	175,100	1,751 00	612 45	350 20	875 50	350 20	210 02	87 55	11 67	.....	.....	.....	.....	.....	4,248 59

OFFICE OF THE COUNTY TREASURER OF ROUTT COUNTY, HAHN'S PEAK, COLO., *July 10th*, 1887.

I, Lewis H. Breeze, treasurer of Routt county, in the State of Colorado, do hereby certify that the above and foregoing statement is a true, full, correct, and complete co*pies* of the entries upon the treasurer's books and tax-list for the year A. D. 1884, showing amounts of the several *a* taxes due and charged against Ora Haley for the said year of 1884 as the same was delivered to me by the county clerk of Routt county, Colorado, with the warrant commanding me, as treasurer of said county of Routt, to collect the same thereto attached, which warrant and list *is* now in my office, at Hahn's Peak, Routt county, Colorado, and that the warrant hereto attached is a true and correct copy of the tax warrant issued to me and attached to said list, and is now in my office, at Hahn's Peak, Routt county, Colorado.

L. H. BREEZE,
County Treasurer of Routt County, Colorado.

48 Said exhibit is endorsed as follows:

No. 496. Certified copy of tax warrant, list, and entries showing Ora Haley's taxes for 1884 upon county treasurer's books. In district court of Pitkin county. Ora Haley *vs.* Lewis H. Breeze. Exhibit "J." Filed July 26th, 1887. John M. Beach, clerk.

STATE OF COLORADO, } ss:
County of Pitkin, }

I, John M. Beach, clerk of the district court of Pitkin county, Colorado, do hereby certify that the above and foregoing writing and figures is a true, correct, and compared copy of a certain Exhibit "J" filed in said district court in a certain cause now therein pending, wherein Ora Haley is the plaintiff and Lewis H. Breeze is the defendant, and that said Exhibit "J" was introduced in evidence by the defendant on the motion to dissolve injunction on the 26th day of July, A. D. 1887, at Aspen, Colorado.

In testimony whereof I have hereunto set my hand and affixed the seal of the said district court, at my office, in Aspen, in the county and State aforesaid, this 27th day of July, A. D. 1887.

[Seal District Court, 9th Judicial District, Pitkin County, Colorado.]

JOHN M. BEACH,
Clerk District Court.

Q. Did you examine the roll that was introduced at Aspen?
A. Yes, sir.
Q. Did you examine this?
A. Yes, sir.
Q. Is this a copy of the one he introduced there?
A. Yes, sir.
Q. You compared it and know it is a copy of the roll he introduced there?
A. Yes, sir.
Q. Did you ever examine the treasurer's roll?
A. The original one?
Q. Yes, sir.
A. Yes, sir.
Q. When did you do it?
A. It was during the term of court at Hahn's Peak. My recollection is that it was in September, 1887. I know it was subsequent to this hearing at Fort Collins, in June—prior—in 1887 or 1878. It was in the September following this hearing at Fort Collins before Judge McAnely; in the June previous, I think it was, 1887.

49 Q. State the circumstances.

A. I had seen these copies and exhibits in evidence at Fort Collins and also at Aspen and Golden, and I had a curiosity to see the original, and I dropped into Mr. Voice's office—he was deputy treasurer as well as county clerk—and asked to examine the book. I had this certified copy with me, and I made a comparison there. I saw they were not alike at all, and I called Mr. Voice's attention to it, he being deputy treasurer, and he explained that L. H. Breeze

had come up there and taken the book and done this work and made these alterations, and that was the reason why they did not corroborate these certificates. Breeze was treasurer then and foreman under Mr. Wilson in this seizure. Mr. Wilson was his successor. I discovered some differences in the certified copy which Mr. Voice did not show, one of which was the addition of the dollar-mark and some ruling between the figures and written over the tops of these columns was "dolls." and "cts.," which would indicate what the figures might represent, and there were some erasures, which indicated that there had been some erasing done and something else written, but just what that was I do not recollect now. I recollect that that was shown, however, on the book; but on looking over the book I saw that these additions were not made to other names, and it was nowhere else to be found in the books except in the letter "H;" nowhere else in the books was there any dollar-marks over the columns only where the letter "H" occurs, and the ink clearly indicated that it was a subsequent writing to the original writing in the book. That was very clear. I called your attention to the matter and also Judge Coulter's attention, and I think you called Judge Rucker's attention to this matter, and there was, perhaps, half of the people there at the Peak during court time came in to make this examination of these books, and it was generally——

50 Q. Name some who came in and went in and saw them, to your knowledge.

A. Well, the Breeze family were all there, I think.

Q. Who were the Breeze family?

A. John M. Breeze and Louis M. Breeze, the treasurer, and L. L. Breeze, the attorney and partner of John M. Breeze.

Q. Who was the county attorney there?

A. John M. Breeze.

Q. And for that year and a long time prior thereto?

A. For some time.

Q. Did you see Mr. Wilson around there?

A. Yes, sir.

Q. The present defendant?

A. Yes, sir.

Q. Do you know of his having seen those alterations?

A. I saw him in the office examining the books.

Q. Did you hear Mr. Wilson say anything about it?

A. I heard Mr. Wilson had said that he did not see as those alterations would affect him in the slightest. I am not sure whether I heard Mr. Wilson say that or whether some one told me that that was a remark he made.

Q. Well, you know that he saw it at that time, in 1887?

A. I know he did. I saw him examining the book.

Q. When was Mr. Wilson elected treasurer?

A. He was elected that following November, I think; yes; he was Mr. Breeze's successor; it must have been the following November.

Q. Did the company pay all the taxes that were assessed against

you, Ora Haley, for the year 1884 on the 22nd of August, 1888, to get those cattle?

A. Yes, sir; they paid all demands.

Q. Were you assessed for real estate in 1884?

A. Yes, sir.

Q. Did you still own that real estate at that time?

A. O, yes.

Q. Have the company ever since paid taxes on that property to get their cattle?

A. Yes, sir.

Q. Did they pay on all the rest of your property that you did not sell to the company?

51 A. Yes, sir; they paid every claim, every demand, and they did not slight anything; they figured it up full, interest and penalty.

Cross-examination.

By H. B. JOHNSON, Esq.:

Q. This was in 1887 that you examined this treasurer's roll and discovered that there had been certain amendments made, was it?

A. To the best of my recollection it was in September, 1887.

Q. What month?

A. September. I am quite sure that was the month court convened. I am not positive whether it was 1887 or 1888; but, as I stated before, it was just subsequent to the hearing at Fort Collins over these replevin suits.

Q. Something like a year previous to this seizure by Mr. Wilson?

A. No; this seizure by Wilson was in 1889.

Q. In 1889?

A. Well, it was 1888. I was not there. It was something like a year previous to the seizure by Mr. Wilson.

Q. You say the company paid these taxes?

A. Yes, sir.

Q. To release the cattle?

A. Yes, sir.

Q. This receipt shows that those taxes were paid by a check of Frank X. Aicher on the German National Bank of Denver. Who got that check?

A. Why, Mr. Wilson got it.

Q. Who got it from Mr. Aicher?

A. Well, I arranged for it.

Q. How did you arrange for it?

A. By providing for it.

Q. How did you provide for it?

A. Well, by giving satisfactory collaterals at the German National bank, which they were willing to accept.

Q. What were those collaterals?

A. ——.

Mr. HUGHES: We object.

The COURT: I do not think you can ask what collaterals were put

up, but in whose name it was done. Find out whether it was done by the company or not.

52 Mr. JOHNSON: I propose to show that it was his individual collateral.

The COURT: You must not ask about the details of the securities that he put up. Ask him whose they were.

Q. Who did those collaterals belong to?

A. Well, I presume they belonged to me, but just what those collaterals were at this moment I cannot recollect. Mr. Aicher was satisfied with them and very kind in assisting me on behalf of the company to get this certified check. I had seen Mr. Wilson and Mr. Breeze but a day or two previous, and they agreed that such a check would be accepted and upon which they would release the cattle.

Q. Just previous to the date of this check upon an injunction of yours being dissolved here in Denver you agreed with Mr. Wilson for these taxes?

Mr. HUGHES: We object; he had no injunction dissolved here just previous to that date. It is an assumption of a fact that does not exist.

The COURT: I think he may answer.

Q. Mr. Haley, state whether or not an injunction that you procured, using the name of Timothy Kinney in place of your own, was dissolved a day or two before the date of this receipt or a few days before.

A. To the best of my recollection, it was but a short time.

Q. Now, you may state whether or not you did not agree thereupon with Mr. Wilson, here in Denver, that you would pay these taxes.

A. No, sir; I never did. I will explain. I asked Mr. Wilson, in company with Mr. Kinney, what he would accept in payment for these taxes—what kind of a check or draft would be received for these taxes—as it was a long ways to go over there and it was a long ways to carry the currency or coin, and I asked him if a certified check by Frank X. Aicher on the German National bank

53 would be acceptable if presented in payment of this demand, and he consented and said it would if presented upon such a date, which was just a day previous to the sale. Perhaps it might have been the day of the sale. Anyhow, it just got time to get there. That was the calculation—just to get on the ground and time to intercept the selling of the cattle.

Q. Thereupon you procured this check. Did you go over yourself and deliver it?

A. No, sir.

Q. Send it over?

A. It was sent over.

Q. Anything that occurred there you know nothing about it?

A. Only from hearsay. My foreman, Mr. Wilson Rankin, presented the check.

Q. Now, you may state whether or not in obtaining that check you in any manner used anything by way of securing it that belonged to the Haley Live Stock Company, a corporation.

Mr. HUGHES: We object. That is foreign to the issues.

The COURT: I think he may answer that.

A. I cannot say that I did, and I have forgotten just what the collateral was. It is barely possible there was no collateral; still, I may have been mistaken.

Q. At the time of this receipt, which is August 21, 1888, instead of August 22nd?

A. Then I was mistaken in the day. I said, I think, the 21st or 22nd.

Q. Who was the owner of those cattle?

A. The cattle being released?

Q. Yes, sir.

—. The Haley Live Stock Company.

Q. When did it become the owner?

A. I think about the 24th of July prior.

Q. How did it become the owner?

A. By purchase of them.

Q. From whom?

A. From Timothy Kinney.

54 Q. I see that these articles of association were signed by Ora Haley and Samuel L. Hass. Who is Mr. Samuel L. Hass?

A. He is a resident of Council Bluffs.

Q. What is his business?

A. Well, he is engaged in various businesses at the present time. He has an interest in a wholesale drug store, and he owns quite a large farm near Council Bluffs.

Q. Where is the office of your corporation in Council Bluffs?

A. The particular room?

Q. Yes; the office.

A. Well, it is in George Wright's office building. He is an attorney in Council Bluffs.

Q. It is in his office or in the building?

A. It is in the building; an adjacent room to his office; where we always held our meetings.

Q. Who occupies the office there?

A. Mr. Hass.

Q. Does he devote his time to it?

A. Whenever it is necessary.

Q. How much stock does he own?

A. Well, two or three shares. Enough to make him eligible as an officer of the corporation.

Q. You do not know whether it is two or three?

A. No, sir.

Q. How many shares in that corporation?

A. Three thousand.

Q. How much a share?

A. One hundred dollars.
Q. Who own the balance of the stock?
A. Well, there are several parties of us. I am the principal owner.
Q. How much do you own?

Mr. HUGHES: We object.
The COURT: I think he has the right to ask.
Mr. HUGHES: He might not own any stock the first year.
The COURT: He may answer.

A. I own about 2,990 shares.
Q. Two thousand nine hundred and ninety out of three thousand?
55 A. Yes, sir.
Q. Who owns the balance of this—the other ten shares?
A. Well, I have stated. Mr. Hughes one, and there is Mr. Kinney and Mr. Hass and Mr. Tourtelotte. They are the owners of the remaining ten shares.
Q. Four of them own ten shares among them?
A. Four of them.
Q. What did that corporation pay for those cattle?
A. I cannot recollect now just what the consideration was.
Q. Nowhere near it?
A. It was somewhere near the capital stock of the corporation.
Q. The capital stock was three hundred thousand dollars. Now, can you tell what the company paid for this property—as near as practicable?
A. No, sir.

Mr. HUGHES: We object. They admit in their pleadings that we were a corporation on August 28th. They deny the corporation before the 29th of August.
The COURT: I understand that the defendants' position is that this corporation was organized for the purpose of conferring jurisdiction upon this court. For this purpose he has the right to inquire.
Mr. JOHNSON: And for the purpose of taking this property from Routt county.
Mr. HUGHES: He has to show that Routt county was a creditor before showing that.

Q. You originally owned this property that you say the company owned at the date of this receipt?
A. Yes, sir.
Q. You sold it or pretended to sell it to Timothy Kinney, did you not?
A. Oh, yes.
Q. For how much?
A. Well, it was something near this three hundred thousand dollars.
Q. Don't you know what it was?

56 A. No; I cannot state from memory, but it was somewhere near that.

Q. Have you got that bill of sale that you gave to Mr. Kinney?

A. Well, I may have it in some old papers, but I have not got it with me.

Q. Don't you know it was three hundred thousand dollars?

A. No, sir; I do not, but my recollection is——

Q. You took a note for the property, did you not?

A. Yes, sir.

Q. Do you know how much that note was for?

A. No, sir; if I did I would know what the consideration was.

Q. You took a chattel mortgage?

A. Yes, sir.

Q. Did you ever record it?

A. As to that I cannot recollect.

Q. You produced that note and chattel mortgage upon the trial here in Denver just previous to the paying of these taxes, did you not?

Mr. HUGHES: We object. Those notes were set up in the pleas. We moved to strike them out and they were stricken out. The only issue is this, who was on the 22nd of July the owner of those cattle? They deny that we were the owners before August 29th, 1888. They admit from that time on that we were the owners or were a corporation. Now, if that is to be gone into—that we fraudulently created the corporation to confer jurisdiction—they should have made some issue on that point.

The COURT: You can raise the point of jurisdiction at any time.

Mr. HUGHES: I want to know at the present time, because we are trying the two cases now.

The objection was overruled.

A. Well, I do not recollect whether that was filed for record or not.

57 Q. Didn't you have them with you and produce them on the hearing?

A. Well, I might have had them. I think I did.

Q. Don't you remember that you took three notes for one hundred thousand dollars each, secured by a chattel mortgage on the same property that you sold to Mr. Kinney?

A. Well, whatever amount I took notes for I recollect was secured by a chattel mortgage, to the best of my recollection.

Q. Well, you executed a bill of sale to Mr. Kinney?

A. Yes, sir.

Q. Did you take up that bill of sale afterwards?

A. I think I did when the corporation acquired title to the property—the cattle. I naturally suppose I did, anyhow, but as to the particular transaction I do not remember.

Q. You have not got that bill of sale here?

A. No, sir.

Q. You may state whether or not that bill of sale included property other than these cattle.

A. No, sir; I think it did not.

Q. Did it not include all the personal property you had in Routt county?

A. Well, I guess it did—that is, it included all personal property pertaining to the cattle business; necessary to conduct that with.

Q. Well, that trial took place in which the injunction was dissolved—in the suit brought by Mr. Kinney—that is, brought by you in the name of Mr. Kinney—was dissolved previous to receiving these cattle back, was it not?

A. No, sir; I do not know any such suit. Mr. Kinney brought an injunction suit, if you refer to that.

Q. You started it, did you not?

A. No, sir; I started a suit of my own.

Q. Did you start the Kinney suit?

A. In what way?

Q. By making the necessary affidavits.

A. Well, now, I do not recollect.

Q. The injunction proceeding?

58 A. I could not tell unless I was to see some documents.

Mr. HUGHES: We object.

Q. There was a trial here just before this settlement, was there not?

A. There was a trial on a motion to dissolve an injunction.

Q. And Mr. Timothy Kinney was here, was he not?

A. Yes, sir.

Q. As a witness?

A. Yes, sir.

Q. And you were here?

A. Yes, sir.

Q. And you both testified, did you not?

A. I think we did.

Q. And didn't you both testify that that was Mr. Kinney's property at that time?

A. I guess we did.

Q. Well, then, how do you make it out that that property belonged to the Haley Live Stock Company from July 24th?

A. Well, I will tell you. It was understood from the beginning that just as soon as this was formed that it was to take this property—just as soon as it had authority to acquire title. That was the purpose of the sale.

Q. When was it formed? When was it ready to acquire title?

A. On the 24th of July.

Q. Well, then, why did you and Kinney both testify here in the latter part of August or September—about the middle of August? Why were you and Kinney both testifying that that property belonged to Mr. Kinney and maintaining suits in replevin and injunction?

A. Well, he was the nominal owner and possessor at that time.

Q. Didn't you testify on that occasion that that was a *bona fide* sale to Mr. Kinney?

A. Yes, sir.

Q. And that you expected Mr. Kinney to pay you the three hundred thousand dollars in money that he had given you notes for?

A. I do not know whether I so testified or not. I said it was a *bona fide* sale, I think, and say yet the transaction was *bona fide.*

Q. And these notes were *bona fide?*

A. Yes, sir.

59 Q. Well, then, you expected them to be paid?

A. Certainly.

Q. Didn't you testify so at that time?

A. I cannot recollect as to that.

Q. How could you swear to that, then, if the understanding was that the Haley Live Stock Company was ultimately to take this property and you were to take all the stock representing the property for it, excepting ten shares?

A. I was advised that that was a better method to get a corporation and have the property conveyed to it from a third party, and in the meantime I would secure better protection, or the property would.

Q. Better protection against what?

A. Why, against these persecutors that have been after me.

Q. Against these taxes?

A. I did not know that there was any taxes. I was not aware that there was any debt against this property.

Q. Did you have any other persecutors except Routt county?

A. No, sir; I do not make it so broad as to make it Routt county either.

Q. Then you were advised to transfer this property to Kinney, and he over to a corporation organized out of the State in order to furnish you better protection against this alleged tax?

A. No, sir; in order to get to some court willing to give a trial on the merits of this case, which I had never had. I have been to the supreme court of the State twice and have never had a trial. I would get an injunction. I was early advised that this tax was void and I knew there was a good deal of personal malice connected with it, and I would get an injunction restraining them from taking this property that they usually did right in midwinter; yes, they would do it when I was gathering beef in a manner in which they could damage me tremendously, and I would get an injunction and restrain them from disposing of the property and they would make a motion before a judge in chambers to have it dissolved and

60 the judge would refuse and they would appeal to the supreme court, and the court would dismiss without a hearing and the merits of the case never were considered. I never had a hearing; never had my day in court; that was the reason I wanted to get some relief somewhere; those are the facts in the case.

Q. As a matter of fact, the time you took these three hundred thousand dollars of notes the understanding between you and Kinney was that they were not to be paid?

A. No, sir; the understanding was that the property was to revert to the corporation just as soon as it was a corporation duly organized and in shape to acquire property.

Q. It was to revert to the corporation?

A. Yes, sir.

Q. Well, it was to revert to you, was it not?

A. To revert to the corporation. No, sir; to revert to the Haley Live Stock Company.

Q. Did Mr. Kinney pay these notes for three hundred thousand dollars?

A. Why, it was not necessary when the property was to return back to the corporation. The corporation took up the notes.

Q. Took up the notes?

A. Why, returned the notes when they took the property back from Kinney.

Q. As a matter of fact, did Mr. Kinney ever pay anything on those notes to you?

A. It was a short time before the corporation was formed and took the property.

Q. Was this corporation formed and prepared to do business on July 24th?

A. Yes, sir.

Q. Why did you have suits brought after that in the name of Kinney as the owner of this property?

A. Well, Mr. Kinney, through his attorney, was advised that he was the proper party; but it was simply an attempt—the order of the court was resisted; the officer attempted—to replevy the cattle,
61 and there was a big mob turned out and resisted the execution of the writ and defied all peaceable service on them of any process.

Q. I will ask you whether that is your signature or not to this paper. (Hands to witness.)

A. I guess it is. It looks like it.

Mr. JOHNSON: I offer in evidence the affidavit made by Mr. Ora Haley on the 4th of August, 1888, in the case of Timothy Kinney *vs.* S. D. Wilson and L. H. Breeze, in replevin.

Mr. HUGHES: We object. It is out of order. I want to look at it first. In the first place, your honor, this is foreign to the issue in this case, if I understand it. Assuming that it is true that this company was incorporated for the express purpose of conferring jurisdiction upon this court, but you will see that here is a corporation existing on July 24th, and the trespass he sued for occurs on July 27th. Taking that in view, it cannot be said here that we committed trespass on the 27th.

The court overruled said objection, and said answer was then read by Mr. Johnson and introduced in evidence and marked Exhibit D 1. It is in words and figures following:

Ex. D 1.

STATE OF COLORADO, } ss:
City of Denver, }

In the District Court of the 2nd Jud. Dist. in the State of Colorado for and in the County of Arapahoe.

TIMOTHY KINNEY, Plaintiff,
vs.
D. S. WILSON and LEWIS H. BREEZE, Defendants. } In Replevin.

Ora Haley deposes and says he is agent for Timothy Kinney and is authorized to make this affidavit, and, being first duly sworn according to law, deposes and says that the said Timothy Kinney is the owner of and is now lawfully entitled to the possession of the following-described goods, chattels, and personal property, to wit, seven hundred head of beef cattle, more or less, the same being branded with either two bars on the right hip or "P" on the right hip or one bar on the right hip.

62 Deponent further saith that the said goods, chattels, and personal property *is* wrongfully detained by the said defendants.

That said defendants, according to his best knowledge, information, and belief, alleges as the cause of the detention thereof that defendants claim the right to seize and sell said cattle for a purported tax due from this affiant to Routt county, and that this affiant is advised by his counsel, I. E. Barnum and W. T. Hughes, that no tax is due from affiant, and he therefore avers the same to be so.

That the same has not been taken for a tax, assessment, or fine pursuant to a statute of this State or seized under an execution or attachment against the property of the said Timothy Kinney liable to seizure or attachment, and the real value of said goods, chattels, and personal property is twenty-five thousand dollars.

ORA HALEY.

Sworn and subscribed to before me this 4th day of August, A. D. 1888.

WILLIAM T. JENISON, *Clerk.*

Q. Mr. Hughes, who is one of the four stockholders owning the other ten shares of stock of this Haley Live Stock Company that are not owned by you, is your attorney here, is he not?

A. W. T. Hughes.

Q. And how much does he own of those ten shares?

Mr. HUGHES: We object; you need not ask that.

Q. When you say you were advised to transfer this property to Kinney and from Kinney over to a pretended corporation, who do you mean you were advised by?

A. I do not know that I ever made that statement, that I was ad-

vised to transfer it to Kinney and from Kinney over to a supposed corporation; I have no recollection of it.

Q. Well, when you speak of being advised that a proceeding of this kind would furnish you better protection, who do you mean you had been advised by?

A. Why, when I was advised it was by my attorney.

Q. Who?

A. Mr. Hughes.

Q. Did these stockholders owning these ten shares buy those shares, or did you present them to them?

A. They bought them.

Q. How much did they pay for them?

A. I guess they paid par; that was my recollection; $100 per share.

Q. Cash?

A. Well, cash or its equivalent.

Q. As a matter of fact, were not those few shares sold to those parties merely to have enough to organize the corporation?

A. Well, it was very necessary, of course, that they should
63 be stockholders in order to form a corporation.

Q. Now, at the time and before you made this bill of sale to Timothy Kinney, you had explained to him all about this tax in controversy, had you not?

A. I do not recollect having done it. I presume I may have mentioned it. I have no recollection about it.

Q. Didn't you testify before that you had explained to Mr. Kinney all about it?

A. Very likely I did. I talked those matters over with my friends, just as any other man would. That is most natural.

Q. Where were you between July 24th and July 27th?

A. Well, I cannot recollect just now.

Q. Were you up there where these cattle were seized at the time?

A. No; I was not where the cattle were at the time they were seized.

Q. Was Timothy Kinney there?

A. I do not recollect that he was.

Q. How long had it been before the 27th of July that you had been there?

A. Well, but a short time, I think.

Q. Were you there on the 24th?

A. Where the cattle were seized?

Q. Yes.

A. No, sir.

Q. Were these papers actually signed on the 24th of July—the articles of incorporation?

A. I cannot tell without examining them.

Mr. HUGHES: Were they not filed in Iowa on the 24th of July? That is a fact and they show it.

Q. In an affidavit here it was made by yourself and Mr. Haas

before a notary public in Wyoming on the 21st of July. Were you *the* there at the time?

A. Whereabouts in Wyoming?

Q. Laramie county.

A. Yes, sir.

64 Q. Now, did you go over to Routt county between the 21st day of July and the 24th?

A. Well, I cannot recollect.

Q. Or between the 24th and the 27th?

A. I very likely did. I was moving around the country, very likely, about that time—on the road night and day a good deal of the time, trying to help out with this matter.

Q. You were president and general manager of the company?

A. Yes, sir.

Q. Was there anything in the nature of a delivery of these cattle to the company prior to July 27th?

A. Yes, sir.

Q. What was it?

A. I met Mr. Kinney and arranged for the purchase, as we had previously understood it, for the Haley Live Stock Company, of this property; and there has been no formal delivery from Kinney to the live stock company as there was from Haley to Kinney.

Q. Had Kinney anything to do with that corporation?

A. Oh, yes.

Q. How much stock did he own?

A. Well, he owns several shares. He is vice-president.

(Recess for five minutes.)

Q. Did you cause to be instituted in the State court an injunction by which to obtain these cattle after this last seizure? You have spoken of several injunctions, first and last. Now, I will ask you if you ever instituted an injunction suit to obtain relief as against this seizure, as made by Mr. Wilson—the one under which you paid the tax.

A. Why, this was the only seizure that was made by Mr. Wilson. He never made but one seizure.

Q. Well, other seizures had been made before?

A. Yes, sir.

Q. And you obtained injunction proceedings and got the cattle released, I think, did you not?

A. Yes; I got them released.

Q. Well, now, did you institute an injunction suit to ob-

65 tain relief from this seizure made by Mr. Wilson?

A. I think not. I think that was Mr. Kinney.

Q. Well, did Mr. Kinney do it?

A. To the best of my recollection.

Q. Was he here to direct the suit or did you act for him?

A. Well, I do not recollect.

Q. Who was employed as an attorney in that suit?

Mr. HUGHES: We object. The record will show.

Mr. JOHNSON: Well, then, I will introduce the record in the suit of Kinney against Louis H. Breeze. The complaint is sworn to by Mr. Hughes himself, and it is alleged that these cattle belonged to Mr. Kinney. The first one is June 1st, 1888, but there was a subsequent complaint after the seizure by Mr. Wilson.

Mr. HUGHES: We object because those files belong to the district court, and, in the first place, the transactions of Mr. Kinney here by his attorney would not prejudice this case. Now, this is the suit of Timothy Kinney against Breeze—Louis H. Breeze. On its face it shows that there is nothing to prejudice this case. They did not show anything except to introduce litigation between Kinney and Breeze. Now, no litigation between them that was not final in character could possibly affect this plaintiff. If it were final, then they might be bound, provided there was a contract or something of that character.

The COURT: Kinney was one of the incorporators of the company, and the papers will be received.

Said papers are therefore admitted in evidence and marked D 2, and are as follows:

66 Ex. D 2.

STATE OF COLORADO, } ss:
County of Arapahoe, }

In the District Court.

JAMES KINNEY, Plaintiff, }
vs.
LEWIS H. BREEZE, Defendant. }

Plaintiff complains and alleges that prior to June 20th, 1888, plaintiff contracted with said Ora Haley for the purchase of his entire herd of cattle and horses, consisting of about 10,000 head, in Routt county, Colorado, and that upon that day plaintiff was given the exclusive, notorious, and sole possession of all of said herds of cattle and horses, and that in consideration therefor plaintiff made, executed, and delivered to said Haley plaintiff's written evidence of indebtedness, consisting of negotiable promissory notes secured by chattel mortgage upon said cattle and horses, and that for and in consideration of said notes and mortgage said Haley then and there delivered unto and placed this plaintiff in possession of said cattle and horses as aforesaid, and that ever since and from said 20th day of June aforesaid this plaintiff has been in the exclusive, notorious, and sole possession of said cattle.

That said cattle and horses are all branded with the brand of said Ora Haley, placed upon said cattle and horses prior to the date last aforesaid, and that the proof of ownership of said cattle and horses is dependent upon said brand, and that said brand was exclusively owned and enjoyed by said Haley under the laws of the State of Colorado, and that no other like brand is found upon cattle that roam and graze over the grazing grounds of said county, and that

a tax sale, as hereinafter mentioned, of said cattle and horses will result in all probability in the sale of said cattle and horses to various and divers citizens of said Routt county, and that the scattering of said brand by means of any tax sale of said cattle and horses will nearly, if not quite, destroy the value of said brand as a means of identification and proof of ownership of said cattle and horses.

That on or about June 25th, 1888, and after the consummation of said sale to this plaintiff as aforesaid, the defendant, acting as county treasurer for and in said Routt county, under a tax warrant, as it is said, issued upon an assessment-roll and its derivative treasurer's tax-roll for the year 1884, wherein said Ora Haley's real and personal property was assessed for taxes, as it is said and claimed by defendant, for said year 1884, in said county, and that under said warrant said defendant has levied upon, seized, distrained, and is proceeding to sell for taxes, as it is said, the identical stock aforesaid bought by this plaintiff of said Haley at the time aforesaid.

The following is a copy of said original assessment-roll from the records of Routt county, Colorado, as it was made and remains of record, and which is made a part of this complaint and is set forth herein for that purpose, to wit:

(Said exhibit is the same as Exhibit P 11 of this record.)

As by reference to said records with the clerk and recorder of said county will more fully appear prior to the alteration of said records by the defendant hereinafter mentioned and set forth.

67 That at a hearing of a cause between said Ora Haley and this defendant, commencing on February 12th, 1887, before Hon. C. C. Carpenter, judge of the first judicial district for and in the State of Colorado, the defendant introduced an official and certified copy of the treasurer's tax-roll for said year 1884.

That the following is a copy of said treasurer's roll introduced by him as aforesaid, and is made a part of this complaint, and is in the following words and figures, to wit:

(Said exhibit same as Ex. P 6 of this record; also contains copy of warrant to treasurer to collect said tax, as found in Ex. P 7 of this record.)

That at an interlocutory hearing before the Hon. Thomas A. Rucker, judge of the ninth judicial district for and in said State, at Aspen, Colorado, of a cause wherein said Ora Haley was plaintiff and said Lewis H. Breeze was defendant, commencing on July 26th, 1887, the defendant introduced in evidence a second purported copy of said treasurer's roll for said year 1884.

The following is a copy of the official and by the defendant certified copy of said treasurer's roll for said year 1884, to wit:

(Same as Ex. P 8 of this record.)

As by reference to the files of that case in cause No. 2098 in the supreme court of this State will show and as by reference thereto will more fully appear.

That said Lewis H. Breeze, as plaintiff is credibly informed, believes, and therefore charges the fact to be, is insolvent and has incurred liabilities amounting to several thousands of dollars by rea-

son of the loss of many thousands of dollars of public and tax funds in his custody and keeping as treasurer aforesaid, and that plaintiff is also credibly informed, believes, and charges the fact to be that said Breeze has lately been encumbering and transferring all his property, both real and personal, and that the sureties of said Breeze are already heavily involved by reason of the loss of the funds aforesaid, and that the county of Routt is a newly organized county, and that its resources are small, and that nearly or quite one-third of its entire revenues have been paid into its treasury by said Ora Haley since its organization as a county down to and inclusive of the current year, excepting for the year 1884, which is the year involving the premises shown and set forth in this complaint, and that plaintiff is credibly informed, believes, and therefore charges the fact to be that neither said Breeze nor his sureties nor said county is or will be able to respond to plaintiff in damages which may and are liable to be occasioned this plaintiff by reason of the premises aforesaid.

That by reason of the premises aforesaid plaintiff is remediless in a court of law, and that a resort to law for a remedy involves a multiplicity of suits, to wit, a replevin suit against each and every purchaser of any of said stock at any tax sale now being conducted and arranged for by the defendant, and that if replevin suits were brought against each and every purchaser of any of said stock at the proposed tax sale under the proceedings aforesaid the plaintiff does not believe it probable that he could so gain possession and be allowed to keep possession under replevin proceedings of the stock branded as aforesaid; that the reason why this application for relief is not made to the judge of the ninth judicial district for relief is because said judge resides at Aspen, Colorado, and that the proceedings above complained of are taking place near Lay, in Routt county, which is about one hundred and ten miles from the nearest railroad point, to wit, Rawlins, Wyoming, and that Lay, in said
68 county, is about eighty miles from Hahn's Peak, the county-seat of said county, and that after reaching Lay from any railway point then the distance from Lay to Hahn's Peak would yet have to be traveled before any writ or process could be issued at that county-seat, and that the great and probable delays incident to proceedings in any way than by this application for relief compels the plaintiff to make the application as herein made.

That the cattle seized and distrained by defendant are not the cattle upon which said alleged tax was assessed for said year 1884, as he is credibly informed, believes, and therefore charges the fact so to be.

Wherefore plaintiff prays a temporary writ of injunction to be directed to the said defendant, his agents, employés, and deputies, enjoining and restraining them and each of them from driving plaintiff's stock from off and away from the ranges and from rounding them up and herding them together, and from taking and keeping possession of them, and from offering said stock or any part thereof for any tax sale to satisfy said taxes for the year 1884 as aforesaid, and that they and each of them be restrained and enjoined

from interfering with the plaintiff's property until the further order of this court, and that at a full and final hearing of this cause the defendant be perpetually restrained from proceeding in the premises.

L. C. ROCKWELL,
I. E. BARNUM,
W. T. HUGHES,
Att'ys for Pl'ff.

STATE OF COLORADO, }
County of Arapahoe. }

W. T. Hughes deposes and says that he is attorney and agent for the plaintiff in the above-entitled cause, who is not, as deponent verily believes, now in the county of Arapahoe, but is in the county of Routt.

That deponent is acquainted with the facts set forth in the above complaint, and that he has obtained his information concerning them from the management of causes in which Ora Haley was plaintiff against said L. H. Breeze.

That deponent verily believes the matters and things set forth in said complaint are true.

W. T. HUGHES.

Subscribed and sworn to before me this 30th day of June, 1888.

WILLIAM T. JENISON, *Clerk*,
By F. E. BUTLER.

STATE OF COLORADO, }
County of Arapahoe, } *ss:*

In the District Court.

TIMOTHY KINNEY, Plaintiff, }
vs.
LOUIS H. BREEZE, Defendant. }

Plaintiff, by leave of court first had and obtained, amends the complaint hitherto filed in this cause and avers that no notice of the meeting of the board of -qualization for Routt county, Colorado, was given or published for the year 1884.

That defendant claims and pretends a tax is due, owing, and unpaid from said Ora Haley to Routt county, Colorado, founded
69 upon the assessment-roll for said year 1884 aforesaid, and no other record or roll, and also that a tax is due, owing, and unpaid upon "six ¼ sections" of lands not described by section, township, or range, and that to satisfy the supposed tax due upon said lands, as described and set forth in said roll in the complaint to which this is amendatory, along with the other supposed items of tax claimed and founded on said roll and mentioned therein, said cattle were seized and distrained by said Breeze as aforesaid.

By W. T. HUGHES,
Attorney for Plaintiff.

STATE OF COLORADO, } ss:
County of Arapahoe, }

In the District Court.

TIMOTHY KINNEY, Plaintiff,
vs.
LOUIS H. BREEZE, WILSON and THOMAS H. ILES, Defendants.

Plaintiff complains and alleges as an amendment to and supplementary of the original complaint filed in this cause:

I. That prior to June 20th, A. D. 1888, plaintiff contracted with one Ora Haley for the purchase of his entire herd of cattle and horses, consisting of about ten thousand head, in Routt county, Colorado, and that upon that day plaintiff was given the exclusive and notorious and sole possession of all of said herds of cattle and horses, and that in consideration thereof plaintiff made, executed, and delivered to said Haley plaintiff's written evidence of indebtedness, consisting of negotiable promissory notes secured by chattel mortgage upon said cattle and horses, and that for and in consideration of said notes and mortgage said Haley then and there delivered unto and placed this plaintiff in possession of said cattle and horses as aforesaid, and that ever since and from said 20th day of June aforesaid this plaintiff has been in the exclusive, notorious, and sole possession of said cattle, except as the possession has been disturbed by the defendants, as hereinafter mentioned.

II. That all of said cattle and horses are branded with the brand of said Ora Haley placed upon said cattle and horses prior to the date last aforesaid, and that the proof of ownership of said cattle and horses is dependent upon said brand, and that said brand was exclusively owned and enjoyed by said Ora Haley under the laws of the State of Colorado, and that no other or like brand is found upon cattle and horses that roam and graze over the grazing grounds of said Routt county, and that a tax sale, as hereinafter mentioned, of said cattle will result in all probability of the sale of said cattle and horses to various and divers citizens of said Routt county, and that the scattering of said brand by means of any tax sale of any cattle and horses will nearly, if not quite, destroy the value of said brand as a means of identification and proof of ownership of said cattle and horses under the laws of the State of Colorado.

III. That on or about June 25th, A. D. 1888, and after the consummation of said sale to this plaintiff as aforesaid, the defendant Lewis H. Breeze, then acting as county treasurer for and in said Routt county, under a tax warrant, as it is said, issued upon an assessment-roll and its derivative treasurer's tax roll for the year
1884, wherein the said Haley's real and personal property
70 was assessed for taxes, as it is claimed and said by the defendants, for said year 1884, in said county, and that under said warrant said defendant has levied upon, seized, distrained, and is proceeding to sell for taxes, as it is said, the identical stock afore-

said bought by this plaintiff of said Haley at the time and in the manner aforesaid.

IV. That the following is a copy of said original assessment-roll from the records of Routt county as it was made and remains of record and which is made a part of this complaint and for that express purpose is set forth herein and is in the following words and figures, to wit (same as Ex. P 11 in this record), as by reference to said records will more fully appear.

V. That in a cause heretofore pending between said Ora Haley and said Louis H. Breeze, in which an interlocutory hearing was commenced on February 12th, A. D. 1887, before the Honorable C. C. Carpenter, judge of the first judicial district for and in the State of Colorado, the defendant introduced an official copy of the treasurer's tax-roll and precept or warrant, upon which a seizure was made for said year 1884, as evidence to prove justification and regularity of process for seizing the property of said Haley, the justness and validity of which was then in question before said judge.

VI. That the following is an official copy of said treasurer's roll and warrant, made and certified to by said Louis H. Breeze and as it was made to exist and appear by an office copy, which is made a part hereof and is in the following words and figures, to wit:

(Same as Ex. P 6 of this record, together with copy of treasurer's warrant as found attached to Ex. P 7 of this record.)

VII. That at an interlocutory hearing in a cause heretofore pending between said Ora Haley and said Louis H. Breeze in the district court of Pitkin county, Colorado, before the Honorable Thomas A. Rucker, judge of the ninth judicial district for and in said State, at Aspen, Colorado, at chambers, commencing on July 26th, 1887, the defendant Louis H. Breeze, to prove his claims of justification and regularity of process for seizing the property of said Ora Haley to satisfy an alleged tax for the year 1884, introduced a second purported copy of said treasurer's roll and a precept or warrant. The following is a copy of said derivative roll and precept or warrant introduced at the hearing last aforesaid and is set forth herein and made a part hereof and is in the following words and figures, to wit (same at Ex. P 8 of this record), as by reference to the files of that case, now No. 2098, in the supreme court of this State, will show and as by reference thereto will more fully appear.

VIII. That no notice of the meeting of the board of equalization for Routt county, Colorado, was given or published for the year 1884.

IX. That the defendants claim and pretend a tax is due, owing, and unpaid from said Ora Haley to Routt county, Colorado, founded upon the assessment-roll for said year 1884 and said altered and changed derivative rolls aforesaid and upon no other records or rolls, and also that a tax is due, owing, and unpaid upon "six ¼ sections" of lands which are not described by section, township, or range, as by reference to said original ass essment-roll above set forth will more fully appear, and that to satisfy the supposed tax due upon said lands, as described and set forth in said roll, in the complaint to which this is amendatory and supplemental, along

with the other supposed items of tax claimed and founded in and upon said original roll and mentioned therein, said cattle
71 were and are seized and distrained by the defendants, as hereinafter mentioned.

X. That on or about June 25th, 1888, said Louis H. Breeze, acting as county treasurer of said county of Routt, seized about one thousand head of cattle bearing the brand aforesaid, and took possession of the same and advertised the same for sale to pay taxes claimed to be due upon said original assessment and treasurer's roll aforesaid, to wit, the sum of four thousand two hundred and forty-eight dollars and fifty-nine cents, due and delinquent, as it is claimed by defendants, since January first, 1885, together with interest, penalties, and costs, as specified and provided for by statute.

XI. That on June 30th, 1888, plaintiff presented a complaint for injunctive relief to the Honorable Victor A. Elliott, one of the judges of said court, who ordered an injunction to issue thereon, according to the prayer of said complaint, upon plaintiff's giving a bond in the sum of ten thousand dollars, and that said complaint and a bond was immediately presented to and filed by the clerk of this court, who issued a writ of injunction, according to the prayer of said complaint, against said Louis H. Breeze, who was served with a copy of said writ on July 3rd, 1888.

XII. That the injunction issued and served as aforesaid has been and still is and now remains in full force and effect, and in nowise modified or dissolved.

XIII. That on or about June 11th, 1888, said Breeze vacated the office of treasurer of the county of Routt, and the defendant Wilson, whose Christian name is now unknown to the plaintiff, became the successor of said Louis H. Breeze in the office of treasurer of the county of Routt aforesaid, and that said Wilson in all his actings and doings hereinafter mentioned is acting as treasurer of said county of Routt and as the successor in office of said Louis H. Breeze, who was enjoined as aforesaid.

XIV. That on or about July 25th, 1888, said Wilson, acting as treasurer aforesaid, upon process issued upon the records aforesaid, seized and distrained several hundred head of said cattle branded as aforesaid, and is now in possession of the same, and is proceeding to advertise the same for sale to satisfy the supposed taxes aforesaid, to wit, the taxes found on the original assessment-roll and the treasurer's roll above set forth, amounting to four thousand two hundred and forty-eight dollars and fifty-nine cents on January first, 1885, together with interest, penalties, and costs,

XV. That none of the cattle seized and distrained by the defendants aforesaid or either of them are cattle upon which any assessment was made for taxes for the year 1884 in said county of Routt.

XVI. That on September the 13th, 1887, said Ora Haley first learned that alterations had been made in the treasurer's roll for taxes for the year 1884 in said Routt county on the page on which tax-payers' names commence with "H," and upon inquiry said Haley first learned that said derivative roll had been altered by said Louis H. Breeze on or about July 20th, 1887, by making addi-

tions 65 thereto of characters, words, and abbreviations to indicate what certain numerals, in his opinion, meant. The character and extent of this alteration appears by an inspection of the copy of the roll introduced by said Louis H. Breeze at the hearing before the Honorable C. C. Carpenter aforesaid and the copy introduced by said Louis H. Breeze at the hearing before the Honorable Thomas A. Rucker aforesaid and those compared with the original roll.

XVII. That plaintiff is credibly informed, believes, and therefore charges the fact to be that Thomas H. Iles and Louis H.
72 Breeze are aiding, abetting, counseling, and advising said Wilson in the premises aforesaid.

XVIII. That said Louis Breeze, as plaintiff is credibly informed, believes, and therefore charges the fact to be, is insolvent and has incurred liabilities amounting to several thousands of dollars by reason of the loss of many thousands of dollars of the other tax funds in his custody and keeping as treasurer aforesaid, and that plaintiff is also credibly informed, believes, and charges the fact to be that said Breeze has lately been encumbering and transferring all his property, both real and personal, and that the sureties of said Breeze are already heavily involved by reason of the loss aforesaid, and that the county of Routt is a newly organized county, and that its resources are small, and that nearly or quite one-third of its revenues has been paid into its treasury since its organization as a county down to and including the current year, excepting the year 1884, which is the year involving the premises set forth and shown in this complaint by said Ora Haley, and that plaintiff is credibly informed, believes, and therefore charges the fact to be that neither said Breeze nor his sureties in said county is or will be able to respond to plaintiff in damages which may be and are liable to be occasioned this plaintiff by reason of the premises aforesaid.

XIX. That the pecuniary condition of said Wilson and his sureties as treasurer aforesaid is not well known to the plaintiff, but he believes, has reasons to believe, and charges the fact to be that said Wilson and his sureties would not be able to respond in damages for the value of the many hundreds of head of cattle which he has seized and is proceeding to sell for the supposed taxes aforesaid, and that the plaintiff is not acquainted with the pecuniary condition of said Thomas H. Iles, but he believes, has reasons to believe, and therefore charges the fact to be that he is unable to respond in damages for the value of several hundred head of said cattle if the same were sold and converted by the defendants or either of them to satisfy said alleged tax.

XX. That a tax sale of said cattle the plaintiff believes, has reasons to believe, and therefore charges the fact to be would result in many and divers citizens of Routt county bidding for and bidding at said sale and becoming in possession of said cattle bearing the brand aforesaid, and that if plaintiff was to attempt to try to protect the value of said brand he would be compelled to institute and prosecute, as he verily believes, divers replevin suits, and that to protect his interests in the premises aforesaid he verily believes

he would be compelled to institute and prosecute divers other suits at law.

XXI. Wherefore plaintiff alleges that he is remediless in a court of law, and that legal remedies are inadequate and insufficient to protect him in the premises, and that irreparable injury will result to him unless he is protected by this honorable court.

Wherefore plaintiff prays that said Wilson and Iles be made parties to this suit and for a temporary writ of injunction to be directed to the said defendants, their agents, employés, and deputies, enjoining and restraining them and each of them from driving plaintiff's stock from off and away from the range, and from rounding them up and herding them together, and from taking and keeping possession of them and herding them together in round-ups, and from offering said stock or any part thereof at any tax sale to satisfy said taxes for the year 1884 as aforesaid, and that they and each of them be restrained and enjoined from interfering with the plaintiff's property until the further order of this court, and that at
73 the full and final hearing of this cause the defendants be perpetually restrained from further proceedings in the premises.

By W. T. HUGHES,
Att'y for Pl'ff.

L. C. ROCKWELL,
JOHN F. TOURTELOTTE,
Of Counsel.

STATE OF COLORADO, }
County of Arapahoe, } *ss:*

W. T. Hughes deposes and says that he is attorney and agent for the plaintiff in the above-entitled cause, who is not now, as deponent verily believes, in the county of Arapahoe; that deponent is acquainted with the facts set forth in the above complaint, and that he has obtained his information concerning them from the management of causes in which Ora Haley is plaintiff against said Louis H. Breeze, except those matters concerning the late seizure and restraint of said cattle by said Wilson, and as to those deponent has been informed by communications sent to him; that deponent verily believes the matters and things set forth in said complaint to be true.

W. T. HUGHES.

Subscribed and sworn to before me this 30th day of July, A. D. 1888.

WILLIAM T. JENISON, *Clerk.*

STATE OF COLORADO, }
County of Arapahoe, } *ss:*

Ora Haley on oath deposes and says that he saw the writ of injunction issued on July 30th, 1888, in a certain cause in the district court of said county pending, in which Timothy Kinney is plaintiff

and Lewis H. Breeze, D. S. Wilson, and Thomas H. Iles are defendants, and that said writ of injunction was attested by W. T. Jenison, clerk of said district court, and had affixed thereto the seal of said court, and that accompanying said writ of injunction were two copies, and that said writ and its said copies were sent to Rankin Brothers at Rawlins, Wyoming, to be from there sent into Routt county, Colorado, and there served upon said defendants; that said writ and the copies thereof aforesaid were carried into Routt county, and the said defendants, D. S. Wilson and said Breeze, and their agents, employees, and servants were found by one Charles Danniels, over the age of twenty-one years and a resident of said Routt county; that said Daniels presented to said Wilson and to said Breeze on the first day of August, 1888, one of said copies of said writ of injunction, and that in the presence of said Lewis H. Breeze one of said copies of said writ of injunction was personally delivered to said Wilson, and that said Danniels also then and there presented said original writ to said defendants and called their attentions to the orders of this court and the attestation of said writ by the clerk of said court and the seal of said court affixed thereto.

That at the time of the service of said writ aforesaid as aforesaid said Wilson was acting as treasurer for the said county of Routt, and said Breeze was acting as deputy treasurer under said Wilson, together with one R. H. Buchanan, the acting sheriff of said county of Routt, and together with some fifteen other persons, and that all these persons were armed with fire-arms and weapons and had possession of about seven hundred head of beef cattle bear-
74 ing the brand of Ora Haley, and that said cattle were seized by said Wilson and said Breeze on July 27th, 1888, to satisfy a tax, as it is said and is claimed by said defendants, to be due from said Ora Haley to said Routt county for taxes for the year of 1884, and which said cattle are the identical cattle mentioned and described in the bills of complaint heretofore filed and remaining of record in said cause as belonging to said plaintiff.

That on and since August first, 1888, the date of the service of said writ as aforesaid, these defendants have held possession of said cattle, which are bunched and herded together, and that said cattle are now bunches and herded together and are in the possession of said Wilson, his deputies, servants, agents, and employés aforesaid, in said county of Routt.

That said Wilson and his deputies have advertised by posting notices that said Wilson will, on Monday, August 6th, 1888, sell said cattle at public vendue, to the highest bidders for cash, to satisfy said tax, to wit, the sum of $4,248.59, as is claimed by said defendants to be levied and laid for the taxes of 1884 upon said Ora Haley's property.

That at the time of the service of said writ as aforesaid said Wilson declared to said Danniels and to other persons within his hearing that he had older and stronger papers than any coming from Judge Decker, and that he intended to keep possession of said cattle under the authority and power he had.

ORA HALEY.

Subscribed and sworn to before me this 3d day of July, A. D. 1888.

W. M. McBIRD,
Notary Public.

STATE OF COLORADO, } ss :
County of Arapahoe, }

In the District Court.

TIMOTHY KINNEY, Plaintiff,
vs.
LEWIS H. BREEZE *et al.*, Defendants. } Amendment to Complaint.

Plaintiff, by leave of the Honorable Westbrook S. Decker, one of the judges of said court, at chambers, first had and obtained, amends his complaint hitherto filed in this cause and amendatory by addition of the same, and avers that no attempt was made by the assessor of said Routt county to assess the said Ora Haley for said year 1884 until the first Monday in July of that year, and the plaintiff is credibly informed and believes, and therefore charges the fact to be, that the assessor of said Routt county never attempted to assess said Haley's property until the date last aforesaid, and that upon that day, in the presence of and under the directions of the board of county commissioners, they, said commissioners and said assessor, attempted to assess said Haley's property.

By W. T. HUGHES,
Attorney for Plaintiff.

STATE OF COLORADO, } ss :
Arapahoe County, }

William T. Hughes, being first duly sworn, on oath deposes and says he is the attorney for the plaintiff in the above-entitled
75 cause, and that said plaintiff is not now, as affiant verily believes, in the county of Arapahoe, and therefore this affidavit is made by affiant; that affiant is conversant with the facts of this case, and that the facts contained and set forth in the above amendment are facts which this affiant learned in the course of litigation between Ora Haley and said Lewis H. Breeze, and that said facts were plead and set forth in an answer filed by said Breeze in a cause in which he was defendant.

W. T. HUGHES.

Subscribed and sworn to before me this 23d day of August, 1888. M*t* commission expires May 19, 1891.

WM. R. SCOTT,
Notary Public.

Q. You are a citizen of Wyoming Territory, are you not?
A. Yes, sir.
Q. Being such, you were advised by your attorney, Mr. Hughes, that you could bring suit in the United States courts, were you not?

A. Well, I might have been so advised. I do not recollect. I knew, however, that that was a fact all the time from the time I commenced contemplating the organization of this corporation. It was some six months prior to its organization.

Q. Mr. Kinney was also a resident of Wyoming Territory, was he not?

A. Yes, sir.

Q. Now, your object in going over into the State of Iowa and organizing a company there was to have the main office of the corporation and this organization in another State, so that the corporation could sue in the United States courts, was it not?

A. No, sir. I had contemplated this corporation for some time and I was advised that the laws regulating corporations in the State of Iowa were more liberal and would subserve the interests of the corporation better than those of Wyoming.

Q. In what particular?

A. Well, in various particulars. I do not recollect. My attorney advised me in that respect. I had an attorney in Cheyenne, Mr. Seever, who had full charge and control of this corporation
76 business and got out the papers and attended to the whole matter. He was an old Iowa lawyer.

Q. Did the corporation take a bill from Timothy Kinney?

A. I think so; a bill of sale or some sort of transfer or instrument.

Q. What was the date of it?

A. Well, it was some time early—about the middle, I should think, or a little after the middle of July.

Q. You say the Haley Live Stock Company took a bill of sale from Timothy Kinney about the middle of July?

A. Well, it was after the middle, but it was prior to the 24th of July. But, mind you, I have explained that it was understood and arranged long before the formation of this corporation that the corporation should be formed for this purpose, and whenever it was formed that it was understood that it might have this property.

Q. You have testified here that you know that when the Haley Live Stock Company took a bill of sale from Timothy Kinney your notes were taken up—the three hundred thousand dollars of notes that Kinney gave you were taken up.

A. Why, that would be the natural result of the transaction.

Q. Is it not a fact that they were taken up?

A. I think they were taken up.

Q. At the time the Haley Live Stock Company took the bill of sale?

A. Well, it was then or about then—the proper time.

Q. How was it, then, that you produced those notes and that chattel mortgage on the trial here in the middle of August?

A. I did not do it the middle of August.

Q. Well, it was near enough?

A. Yes, sir.

Q. How did you happen to have those notes here and produce them in court if they had been taken up the middle of July?

Mr. HUGHES: We object.

The COURT: I think he may answer the question.

77 A. Well, I did not speak positively. I must have been mistaken in the dates. I cannot tell from memory so close.

Q. How did you happen to have Mr. Kinney go on the stand at that trial in the month of August—about the middle of the month of August—1888, and testify that he gave those notes in good faith and intended to pay them in cash and was able to pay them, if your understanding all the time was that the property was to be whipped over to a corporation and all but a thousand dollars of it out of three hundred thousand dollars come back to you in the shape of stock for the property? Can you explain that?

A. I did not have Mr. Kinney go on the stand at all. He was defendant and interested in this dissolution of this injunction.

Q. How did you, then, upon that occasion come to testify that you sold that property and took those notes and that chattel mortgage in good faith and you expected Mr. Kinney to pay that three hundred thousand dollars—that he was able to pay it—if you intended all the time that the property was to be diverted to a corporation and all of it to come back to you in the shape of stock except a nominal amount?

A. Well, I testified to the facts in regard to the case.

Q. You testified that that was Kinney's property?

A. I did.

Q. Along about the middle of August? Why was it Kinney's property if he had executed a bill of sale to the Haley Live Stock Company for it a month before?

Mr. HUGHES: If your honor please, it is not right to assume that a witness has said a certain thing when he has not. If there was a bill of sale from Kinney to the Haley Live Stock Company this is the first time I ever heard of it.

The COURT: I think he did say something of that kind.

78 A. I stated that it was some sort of conveyance, but whether it was a bill of sale or just what it was I do not recollect; but there was some transfer by which—it might have been the old bill of sale, endorsed from Kinney to the Haley Live Stock Company. Since I have been thinking of it I am inclined to think that was the case.

Q. When was that endorsement made?

A. As to the date I cannot state.

Q. Was it made before the 27th day of July?

A. I cannot state that.

Q. You cannot?

A. No, sir.

Q. What is your best impression?

A. Well, it was as soon as we could meet and have a meeting, after we were a corporation, authorized to do business and acquire property.

Q. Yet you signed these articles of association and swore to them on the 21st of July, up in Wyoming. Now, how soon did you go down, after the 21st of July, to Council Bluffs to hold a meeting?

A. Well, I don't recollect.

Q. Well, was it before the 27th of July?

A. Well, I cannot say that; I should think not.

Q. You should think not?

A. I was very busy, I know, at the time; but I had a full understanding with Kinney and Haas that this property was to be acquired as soon as we were a corporation and duly organized.

Q. Is it not a fact that at the time you testified here, as you admitted you did, in the middle of August on this trial that this property had never been transferred or sold to the Haley Live Stock Company?

A. Oh, it had certainly been transferred on a full understanding.

Q. Any bill of sale?

A. Well, as to that I have testified. I do not recollect what instrument passed showing the conveyance.

79 Q. Had there been any instrument executed prior to the 27th of July or prior to the time you testified to?

A. I could not say as to that.

Q. Well, is it not your impression that there had been?

A. There might not have been.

Q. How could there have been, Mr. Haley, with those notes in your pocket and you testifying that Mr. Kinney owed you those notes if the property that he had given his notes for—three hundred thousand dollars—had gone to the corporation already?

A. Well, if I still had the notes, why, of course, I had not turned them over to Kinney; that is all. That is the only way I can explain it. I cannot recollect the dates.

Q. Now, you have stated that in this bill of sale to Mr. Kinney you conveyed to him all of the personal property you had in Routt county, as I understand it?

A. Well, all of the personal property that was necessary to conduct the cattle business, I think I said. I might have had some other personal property. I do not recollect.

Q. Well, did you convey all the personal property that you had?

A. I say I do not recollect.

A. Don't recollect?

A. No, sir.

Q. Didn't you convey horses, wagons, household furniture, and everything about the ranch there—tools, implements, &c.?

A. I conveyed horses and wagons and harness, but I do not think I conveyed any household furniture.

Q. Well, farm tools and everything of that kind?

A. I might have conveyed the farm tools.

Q. Was the property all conveyed to the Haley Live Stock Company whenever it was conveyed?

A. Whatever was conveyed to Kinney was conveyed to the company—the Haley Live Stock Company.

Q. Did you convey the ranch to the Haley Live Stock Company?

80 A. No, sir; I do not think the ranch was conveyed to the Haley Live Stock Company.

Q. There was some three hundred head of horses, was there not?

A. I think so.

Q. And mowing machines and wagons?

A. I think there was; to the best of my recollection they were conveyed.

Q. Didn't you testify on that trial, and didn't Mr. Kinney testify also, that he did not want any of those things except the cattle, but that you put everything in in order to have all of your personal property embraced in the bill of sale?

A. I have no recollection of testifying to that.

Q. These three hundred head of horses, mowing machines, and wagons, and everything remained right there on the ranch, did they not?

A. Yes, sir.

Q. All the time?

A. They remained on the ranch or in the vicinity.

Q. And you owned the ranch?

A. Yes, sir.

Q. What did the Haley Live Stock Company, down at Council Bluffs, want with these wagons, mowing machines, and things of that kind; what did the corporation, now distinct from Mr. Ora Haley, want with those things upon that ranch?

Mr. HUGHES: We object.

The COURT: I think he may ask it.

A. Why, to conduct the cattle business. They have to have wagons and harness to move the wagons about the country, and horses to handle their cattle; it is necessary.

Q. You do not claim, Mr. Haley, now, do you, under oath that this property was ever delivered over to the Haley Live Stock Company prior to the 27th day of July?

A. Yes; it was understood to be delivered.

81 Q. Was it delivered? Had it been delivered?

A. Yes; it was practically delivered.

Q. How?

A. Why, the minute that the corporation had formed and was in shape to acquire title to it it was the understanding between Haas, Kinney, and myself that that property was to be the property of the Haley Live Stock Company.

Q. Then the delivery was a mental operation, was it not?

A. Yes; I expect it was.

Q. You heard your affidavit read, made on the 4th of August, in which you testified that that property belonged to Timothy Kinney and was then in his possession. Was that true or was it false?

A. Well, it was. He was one of the possessors. There had been no formal delivery of the property; only this understanding with the corporation.

Redirect examination.

By W. T. HUGHES, Esq.:

Q. Mr. Haley, when did you first meet me and get acquainted with me?

A. It must have been about three years ago.

Q. Do you remember speaking to me at the time of your forming a corporation to do your business under?

A. Yes, sir; I recollect talking with you over the subject.

Q. You have an attorney in Laramie, have you not?

A. Yes, sir.

Q. Mr. M. C. Brown?

A. Yes, sir.

Q. You have one in Cheyenne, have you not?

A. I had an attorney for this special purpose. He was familiar with the Iowa laws; he is no general attorney.

Q. And your attorney in Council Bluffs is Mr. Wright?

A. Messrs. Baldwin & Wright.

Q. Do you recollect having applied to your various attorneys along through 1887 or conferring with them about forming
82 your corporation?

A. Yes; I talked about this matter, and I was delayed considerably during the summer when I formed this corporation through my attorneys not attending to it, and I was compelled to get this man Lewis to have it perfected.

Q. Do you remember the reasons you gave your various attorneys along the line for doing business as a corporation?

A. Well, I do not know as I do.

Q. Do you recollect talking that you did business through several States and Territories?

A. Yes, sir.

Q. Over long lines of railways and how scattered you were and what an advantage such a company would be to you?

A. I recollect that being one of the reasons for my wishing to form a corporation.

Q. You say you spoke of what some of these advantages were. Do you recollect such a conversation with me at the time?

A. I recollect a conversation with you.

Q. Did you ever have talks with your home attorney, Mr. Brown, about it?

A. Yes, sir.

Q. About those times or thereabouts?

A. Well, for the best of two years I had been talking with and consulting them.

Q. And with your Cheyenne attorney, Mr. Seever?

A. Not until about the time the corporation was agreed upon fully.

Q. Do you recollect in 1888 about the time you took serious steps, the first steps you took, towards incorporating the company?

A. Yes, sir.

Q. About what time was it in 1888 you took the first serious steps?

A. It was some time in the spring of 1888.

Q. As late as May or June?

A. Some time in May, I would guess. I know I kept at it until I got it completed.

Q. Do you recollect that about that time you conferred with me about it—along in the spring of 1888?

A. Yes; about then; prior and subsequently.

83 Q. Do you recollect that I referred you to persons conversant with the Iowa law?

A. Yes, sir.

Q. And not to be in a great hurry; to see about that and get the law before you incorporated it?

A. Well, you recommended me to see the Iowa lawyer also, and I had told you of this man Severs, who was an Iowa lawyer and quite a corporation lawyer, and you favored the idea.

Q. Now, Mr. Haas lives at Council Bluffs?

A. Yes, sir.

Q. Is he not an old business associate of yours for years?

A. Yes, sir.

Q. In various enterprises?

A. Yes, sir.

Q. Do I understand that he is very largely at Omaha and Council Bluffs engaged in the cattle trade?

A. At Omaha.

Q. Haas lives at Council Bluffs?

A. Yes, sir.

Q. Now, the gentleman has asked you when you were persuaded to go down to Iowa, and so on. Can you furnish any explanation why you favored Iowa more than any other place—more than Wyoming, for example?

A. Well, it being — more convenient point as well as the laws being more favorable, as I was advised by these Iowa attorneys.

Q. Well, was it not also a desire on your part to have Mr. Haas associated with you?

A. Yes, sir.

Q. That he might operate at that place for the company?

A. Yes, sir.

Q. You then had in view the formation of a corporation a long time prior to your actually incorporating?

A. Yes, sir.

Q. Prior to any hearing in any of the courts of Colorado, had you not?

A. Yes, sir; I had it in contemplation.

Q. And had talked seriously about it?

A. I had talked with my attorneys about it.

Q. Is it not a fact that the delays were largely owing to the delays of the various attorneys?

84 A. Yes, sir; it was. I know it was during 1888. I was delayed through my attorneys not acting promptly.

Q. Yet it was understood that if the company was incorporated it would do business in Routt county, and do a cattle business, &c., in Wyoming, Routt county, and Iowa, and elsewhere.

A. That was the business—the object of the incorporation.

Q. You have no creditors in Routt county; had you in the summer of 1888?

A. No, sir; not that I am aware of.

Q. The only person making any claim against you was the county attorney?

A. Yes, sir.

Q. You understood that all your property was holden for that tax, did you not?

A. Yes, sir.

Q. Was you not advised by your counsel that your property was holden for the tax, that it was a lien on it?

A. I was.

Q. Did you transfer anything to Kinney for the purpose of cheating any creditor?

A. No, sir.

Q. As I understand, some of your counsel told you that it would be best in incorporating to make the transfer as you have?

A. That is true.

Q. Kinney is associated with you in the business?

A. Yes, sir.

Q. When you first talked of this corporation what did you tell your counsel why you desired a corporation to do business under?

A. Well, that it was better to handle all the property in that way. It was so scattered that I could have better commend or control of it.

Q. Was it pointed out to you that, as scattered as your business was, in case of your death that it would be a troublesome affair?

A. Yes, sir.

Q. When were those advantages talked over to you?

A. I did not recollect just when, but it was talked over among the other advantages and prior to the formation of the corporation.

85

Q. You do a considerable business in Wyoming, do you not?

A. Yes, sir.

Q. And considerable in Colorado?

A. Yes, sir.

Q. And considerable along the road, do you not, between Wyoming and Chicago?

A. Yes, sir; that is my place of marketing.

Q. And you ship several car-loads of cattle to Chicago, do you not?

A. Yes, sir.

Q. Were these things mentioned as reasons why a corporation would be more compact and bring about a better management, &c., than you as an individual?

A. Yes, sir; they were all talked over and the advantages shown up.

Q. You have always owned your ranches in Routt county?

A. Yes; I have always owned my land there.
Q. And always some personal property, have you not?
A. Yes, sir.
Q. You own something like a thousand acres, do you not, in Routt county?
A. Something less than a thousand acres.
Q. Are those ranches of considerable value?
A. Well, they are pretty fair ranches.
Q. Gen. Johnson showed you an affidavit that had been sworn to by you in a replevin suit?
A. Yes, sir.
Q. Do you recollect what was said at the commencement of that suit?
A. By me?
Q. By Kinney's attorney.
A. Mr. Kinney had commenced the injunction suit.
Q. Did he not prepare them?
A. Yes, sir.
Q. And were the writs not resisted?
A. The writs were resisted.
Q. The officer could not serve them?
A. No, sir; he was advised that he had better replevy.
Q. Was it explained to you before you signed that affidavit what the object of a replevin suit was; was the legal effect and
86 purport of that explained to you at the time; do you recollect any discussion about the propriety of making that affidavit during the first days of August, 1888, whether or not there ought to be some showing that Kinney was the owner?
A. Well, I cannot recollect of it.
Q. Do you remember the night that the writ issued?
A. I do.
Q. Do you remember the sending out by me and getting sureties?
A. Yes, sir.
Q. Do you remember the going to Mr. Jenison's office at night-time?
A. I do.
Q. Do you remember the hurried preparation of that case?
A. I do.
Q. Do you have any recollection of being told that replevin was merely to gain possession of the property there?
A. Yes, sir.
Q. And that a nominal possession was sufficient as against a wrongdoer?
A. Yes, sir; I remember such talk, and that Kinney would have the right to replevy.
Q. And do you recollect any conversations like this?

Mr. JOHNSON: That is leading. Let him state what was said.

Q. Tell us what was said in and about the hurried discussion on that replevin suit that night. State as near as you can what was said to you of its object and purpose.

A. Why, the object was to get possession of the cattle. Of course, that was the prime object.

Q. That injunction writ had been resisted?

A. Yes, sir; and we thought there could be a replevin writ enforced, but the replevin writ was resisted more strongly and more violently than the injunction writ was. They had taken the cattle back into the neighborhood and aroused the whole neighborhood in arms against any attempt to take the cattle, and if I had had any process from any court to take possession of those cattle they were going to hold those cattle until they made the money out of them that they claimed.

87

Q. Do you recollect any further advice being given as to the office of a replevin suit? That in case of mistake or anything of that kind what would be the result in a replevin suit? Whether or not it was anything more than the right to the possession of the property?

A. That was all.

Q. Do you recollect anything like this being said?

A. The company's bond was given.

Mr. JOHNSON: We object.

Objection sustained.

A. It was some time ago. It is hard for me to recollect. I know it was made clear to me at the time.

Q. Do you recollect having any advice given to you about making an affidavit that Kinney was the owner, &c., so far as replevin was concerned?

A. I was told that he had a perfect right to it, and that I had a perfect right to make such an affidavit. I was so advised.

Q. Was there anything said of the proofs in the case; what the defendants would have to prove?

A. I was advised they might testify that Kinney——

Q. Well, now, Mr. Haley, it seems that you recollect the occasion of getting out of that replevin writ. About what time of the day was it gotten out, and under what circumstances?

A. It was very late in the evening. It was done very hurriedly so that the 11 o'clock train that night might be taken, and the writ got into the hands of the proper party to be served as speedily as possible.

Q. Where did you swear to your affidavit? What place?

A. I think it was in the office of the clerk of the district court.

Q. About what time in the night?

88

A. It must have been nine o'clock in the evening. It was quite late in the evening, because we had a great deal to do in preparing the bonds and getting everything in shape.

Q. Whose money was it that paid the taxes on those cattle?

A. The Haley Live Stock Company's.

Q. They have arranged with you about it, have they?

A. Yes, sir.

Q. You never intended voluntarily to pay that tax, did you, as a volunteer?

A. No, sir.

Q. Why did you pay the tax for the company?

A. Why, to relieve the property. There was no other course to pursue. They said they would sell the cattle sure, if they had to drive them out to market themselves; that they would hold them as long as there was a hair to hold to.

Recross-examination.

By H. B. JOHNSON, Esq.:

Q. How did that money become the money of the Haley Live Stock Company?

A. Well, by paying it in their interest and protecting their property.

Q. You stated that the money that was used to pay the taxes was the money of the Haley Live Stock Company. Now, how did it become the money of the company? Explain that.

A. It was raised for that purpose and for no other purpose.

Q. Had it ever been in the treasury of the company?

A. I was the treasurer of the company.

Q. You were the treasurer?

A. Yes, sir.

Q. And you were president?

A. And director.

Q. General manager?

A. And general manager.

Q. And you put up your individual securities and got a man to draw a check for the amount, did you not?

A. No, sir; I do not recollect what the securities were.

Q. Were they anything that ever belonged to the Haley
89 Live Stock Company? If so, state what they were.

A. I do not recollect what it was. Mr. Aicher was with me and it was through him that I arranged for this certified check. Perhaps I can recollect what the security was if I go on.

Q. Don't you know that it was not anything that was ever delivered to the Haley Live Stock Company?

A. I do not think——

Q. What did the company have at that time to put up as security for this twelve thousand dollars?

A. I do not know that it had anything unless I done something with my stock. I might have done something of that kind, as I had a right to do so.

Q. You say that you were told that you had a right to swear on August 4th that this property on July 27th, when it was seized, was the property of Kinney and in the possession of Kinney. You were told that, were you?

A. Yes, sir; I was told that Kinney had a right to replevy the stock.

Q. Was that advice based upon the understanding that before the 27th of August or the 27th of July this property had been sold and delivered to the Haley Live Stock Company?

A. No statement of that kind that I recollect of.

Q. Did you understand at the time you testified in that affidavit that this property on the 27th day of August or July, when seized, was the property of Kinney and in the possession of Kinney? Did you understand at that time that the property had been sold and delivered over to the Haley Live Stock Company?

A. I understood that the property was to be the property of the Haley Live Stock Company just as soon as the corporation was capacitated to acquire property.

Q. I am not asking what some one supposed would become a fact at some future time, but did you understand that the Haley Live Stock Company had purchased and received possession of this property?

90 A. Well, practically, but in reality there had been no formal delivery in any manner.

Q. How "practically," then?

A. Well, Mr. Kinney was representing and in charge of the property; the men were in his employ at this time and the foreman was under his instruction.

Q. When was the stock of the company first issued?

A. I cannot just recollect when it was.

Q. Where are the books of the company?

A. Why, I have some of them.

Q. They have got a stock book here?

A. No, sir.

Q. They have got records showing meetings of the company?

A. They are not here; no, sir.

Q. They have a stock book here?

A. No, sir; I have no book here.

Q. You have nothing here to show when that company was first organized?

A. Yes, sir; the articles of incorporation.

Q. To know when they first held meetings and transacted any business or issued any stock or elected any officers or anything else?

A. Why, the incorporation of the company provides the first officers.

Q. Yes; that is true. But the corporation did not issue any stock. When was the stock first issued?

A. I cannot recollect, sir.

Q. Had it been issued on August 4th?

Mr. HUGHES: We object to that because immaterial. He should have served notice on us to produce the books.

Q. You say the writs had been resisted over there?

A. Yes, sir.

Q. You had been in litigation three or four years over this tax, had you not?

A. Yes, sir.

Q. Did not the litigation commence about the spring of 1885 over this tax due for 1884?

A. I think so. In 1885 or 1886.

Q. You got out an injunction against the collection of the tax?
A. Yes, sir.
91 Q. It was dissolved, was it not?
A. Yes, sir.

Mr. HUGHES: We object. The records are the best evidence.

Q. You got out another injunction, then, afterwards?
A. Yes, sir; several of them.
Q. That was before Judge Carpenter?
A. Yes, sir.
Q. And he refused to dissolve it?
A. Yes, sir.
Q. And it went to the Supreme Court?
A. Yes, sir.
Q. And the Supreme Court dissolved it and dismissed the appeal?
A. Yes, sir.
Q. And then you got out another injunction before Judge Rucker, at Aspen?
A. Yes, sir.
Q. And he refused to dissolve it?
A. Yes, sir.
Q. And it went to the Supreme Court and was dissolved and the appeal dismissed?
A. Yes, sir; that is my recollection.
Q. Then you got out another injunction here in Arapahoe county, didn't you?
A. Yes, sir.
Q. And the second one in the name of Mr. Kinney. The two injunctions were issued by judges in Arapahoe county, were they not?
A. One injunction and one replevin writ, if I recollect.
Q. Don't you remember that one of those injunctions was against L. M. Breeze, who was the treasurer before Mr. Wilson came in, and was talking about proceeding, and you got out a second one against Wilson from claiming those taxes, and both of them were tried together and both dissolved by Judge Decker?
A. I recollect.
Q. Now, it was during all this litigation that all this talk about organizing a corporation took place, was it not?
A. Well, it was during the time; of course not in connection with the litigation.
Q. You thought you were not getting justice in the State courts, did you not?
A. I felt that way, and I appealed the case and gave a good bond to go — the Supreme Court of the United States, and suppose it has issued, notwithstanding that the company have no
92 advice.
Q. Well, circumstances that took place further was merely moves to release the cattle? You obtained a release of the cattle under all these previous injunctions until the last one?
A. Yes, sir.

Q. When it came to these last injunctions, after the case had been to the Supreme Court twice, Mr. Wilson refused to release the cattle on an injunction, did he not?

A. Oh, he refused to release them; yes, sir.

Q. On the ground that the court could not issue an affirmative injunction without notice?

Mr. HUGHES: We object.

Objection sustained.

Q. You say that you have other property over there—real estate?

A. Yes; lands.

Q. Have you got a patent to it?

A. Yes, sir.

Q. When did you get them?

A. I have not got patents to all of it, but I have final receipts to all of it. I regard it as equivalent.

Q. When did you get the final receipts?

A. At the time proof was made.

Q. When was proof made?

A. At different periods.

Q. Was any proof made at the time this litigation commenced?

A. Prior to this litigation with Wilson.

Q. They were pre-emptions, were they not; pre-emptions or homesteads made by your cowboys over there, were they not?

Mr. HUGHES: We object.

Objection sustained.

A. I own this land and was the possessor of it and the only claimant.

93 Redirect examination.

By W. T. HUGHES, Esq.:

Q. Mr. Johnson mentioned the suit commenced in the spring of 1885. You said that you did not succeed in the courts?

A. Yes, sir.

Q. Do you recollect whether Judge Carpenter, at Hahn's Peak, dismissed that case?

A. In the absence of a cost bond, I believe.

Adjourned till to-morrow, Jan. 25, 1890, at 9.30 a. m.

WILSON RANKIN, a witness called on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct examination.

By W. T. HUGHES, Esq.:

Q. Your name is Wilson Rankin?

A. Yes, sir.

Q. What has been your employment since you have resided in Routt county?

A. Well, I have been handling cattle.

Q. Whose cattle?

—. The Haley Live Stock Company's. I am employed by them now.

Q. How long have you been in its employ?

A. Something over a year or a year and a half; I should judge something like that.

Q. You were present yesterday, were you not?

A. Yes, sir.

Q. You heard some mention*ed* made of some seven hundred head of beef cattle, did you not?

A. Yes, sir.

Q. What do you know of those cattle?

A. Well, I was gathering cattle for the market for the Haley Live Stock Company and on the road with them to the railroad, and they were seized by the county treasurer of Routt county for taxes, as they claimed.

Q. Who seized those cattle?

A. The county treasurer.

Q. Mr. Wilson?

A. Yes, sir.

Q. And Breeze?

A. Yes, sir.

Q. And any others?

A. Several others.

Q. Do you remember how many cattle you had gathered for the market?

94 A. I had at that time, I think, about seven hundred and forty or seven hundred and fifty; along there. I do not remember the exact number.

Q. Did you have them in possession when they were seized?

A. Yes, sir.

Q. From what herd did you gather them?

A. From the herd of the Haley Live Stock Company.

Q. How large is that herd; about how large?

A. Well, I should say it was from eight to ten thousand head.

Q. And out of the eight or ten thousand head you had cut out this seven hundred and forty head for market?

A. Yes, sir.

Q. Where did you leave the rest of the herd?

A. On the range there in Routt county.

Q. Where you cut these beef cattle out?

A. Yes, sir.

Q. Do you remember the weights of those cattle?

A. On the market?

Q. Yes; when they were weighed.

A. Yes; I have heard what they weighed; twelve hundred and sixty-three pounds, I think.

Q. That was the average?

A. Yes, sir; that was the average.

Q. Where were you on or about the 22nd of August, 1888?

A. I was on the Bear river the 21st or 22nd; I don't just remember, but about that time.

Q. Do you remember the transaction by which these cattle were seized by Mr. Wilson and his posse?

A. Yes, sir.

Q. State what followed.

A. They were released by paying them a check for $12,750. They were released by paying them a check for twelve thousand seven hundred and fifty some odd dollars.

Q. Did you hear any conversation between Mr. Wilson or between Mr. Breeze and the parties who tendered this money?

A. Yes, sir; I heard some conversation.

Q. State that conversation.

A. Why, I handed Mr. Wilson the check myself.

95 Q. And what did you demand for the check, if anything?

A. I demanded a receipt for the money paid.

Q. State just what was said when you handed the check.

A. I wanted a receipt for the money paid in the name of the Haley Live Stock Company. John Breeze said, "What do we know about the Haley Live Stock Company? We know this money came from the hand of Ora Haley, and we will make out the receipt in his name."

Q. You demanded a receipt to the Haley Live Stock Company?

A. Yes, sir.

Q. Did you state to them that the money you had was his money?

A. Yes, sir.

Q. And you wanted a receipt?

A. Yes, sir.

Q. Did you ever see this document before? (Hands to witness Ex. 4.)

A. Yes, sir.

Q. What document is that?

A. That is the receipt for the money paid.

Q. That receipt was given to you after you had asked for another kind?

A. Yes, sir.

Q. State as near as you can who took these cattle from you; who seized them.

A. Mr. Wilson and the county treasurer.

Q. Were there not others with him?

A. Yes, sir.

Q. Name them as near as you can.

A. Mr. Lewis H. Breeze, Mr. Adair, Fred. Elliott, and others. I do not just remember. There were several of them. There was something——

Q. Something like a score of men?

A. Yes, sir; from twelve to twenty men. I do not know the number of men that was around the cattle.

Q. Did you see Mr. John Breeze around there?

A. Yes, sir.

Q. More than once?

A. I saw him almost every time I was around that camp and around the herd when they were holding them.

96 Q. What position did Mr. John Breeze assume when he would be around there?

A. Well, he seemed to be the advisor and instructor.

Q. Why do you say he seemed to be the advisor and instructor?

A. Mr. Wilson seemed to act under his advice and instructions in every way. Everything he did he would go to Mr. Breeze for advice.

Q. Was Mr. Breeze on the ground all the time when you would be there?

A. I think he was there, I think, every time I was around the camp.

Q. Where were you when the cattle were first seized? With them?

A. Well, we were on the head of Fortification creek.

Q. I believe they took the cattle from you in the morning?

A. Yes, sir; at daylight.

Q. Were these men armed?

A. Yes, sir; I saw them have guns and six-shooters.

Q. Where did they take them after they seized them?

A. They took them back to a creek called Little Bear creek, about fifteen miles from there, and held them there a few days, and then took them farther back on Bear river and held them there some two or three days, and then took them from there to Twenty Mile park, some fifteen miles farther.

Q. How far out of the way of the market did they take them? About forty miles?

A. About forty miles, I should think.

Q. Out of the way?

A. Yes, sir.

Q. State fully how these cattle were kept, as near as you can, from the 27th of July to the 22nd of August.

A. Well, they were held close. The cattle did not have the liberty that — should have to hold their own, and they were handled by unexperienced men; in fact, they did not seem to care very much.

Mr. JOHNSON: I object to this witness saying what seemed to him. Tell what was said or done.

97 Q. Tell what you know about it; the kind of range and how the cattle were kept.

A. They were held on a very poor range at the time I saw the cattle; they were on very poor grass. The cattle were shrinking, I thought, every day, which they did. It looked to me it did not seem as they cared much how they kept them, whether they held their own or shrunk, but just so they held them.

Q. Do I understand you to say the cattle were guarded by these men?

A. Yes, sir.

Q. Some score of men were guarding them?
A. Yes, sir.
Q. What were you doing while they were guarding these cattle?
A. We were lying idle; me and my men.
Q. How many men did you have?
A. I had ten men at that time.
Q. And during all that time were you and your men idle?
A. We were idle about twelve days or thirteen days. Then we went to gathering some more cattle, and we were lying there in readiness expecting to get the release of these cattle and take them on to market.
Q. You had frequent interviews with Mr. Wilson, had you not?
A. Yes, sir.
Q. Did you ever confer with him about a release of the cattle?
A. Yes, sir.
Q. What was said with reference to that?
A. Well, he said he could not release them until this money was paid.
Q. Did he make any mention to you of his being under any one's orders?
A. Yes, sir.
Q. State what was said.
A. He said he was authorized by the county commissioners to seize these cattle for taxes, and also acting under the instructions of the county attorney.
Q. Who was the county attorney?
A. John M. Breeze.
Q. Do you remember about the value of those seven hundred dollars?
98 A. Well, I don't exactly.
Q. Well, approximately, in rough figures.
A. I should judge they were at that time worth twenty-five thousand dollars.
Q. Were worth twenty-five thousand dollars?
A. Yes, sir.
Q. And the amount you paid to have them released was some twelve thousand?
A. Twelve thousand seven hundred and some dollars.
Q. Were they fat, marketable cattle?
A. Yes, sir; when we gathered them. At the time they were seized they were.
Q. Were any of these cattle that were seized turned out ultimately as having shrunk too much for market?
A. Yes, sir; after the cattle were released I cut out from seventy-five to one hundred—I don't just remember; between seventy-five and one hundred head of cattle that were not marketable at all or was not that season.
Q. In selecting cattle for market what class do you select?
A. Well, beef cattle; we select the best we can find.
Q. You took, then, the best and fattest out of the seven thousand head?

A. Yes, sir.

Q. As near as you can judge, what was the shrinkage per head on those cattle?

A. Well, in pounds, I should think there was at least one hundred and twenty-five to one hundred and fifty pounds.

Q. Would this shrinkage affect the whole animal as a beef animal?

A. Yes, sir; it would.

Q. What would be the consequent effect upon the balance of the carcass?

A. It would decrease in value the rest of the carcass.

Q. It would be a damage, would it not?

A. Yes, sir.

Q. But a little difficult to arrive at under the circumstances?

A. Yes, sir; it would.

Q. Do you know what the daily loss was by reason of the men lying idle—the outfits being idle during the time? Estimate it as near as you can.

A. Well, as near as I can recollect, about twenty-five dol-
99 lars or over; twenty-five to thirty; along there.

Q. Do you mean per day?

A. Yes, sir.

Q. What was your capacity? What was your position with reference to the outfit?

A. I was supposed to be the foreman.

Q. You were the foreman, were you not?

A. Yes, sir.

Q. You stated that you cut these out for the Haley Live Stock Company. Is that entirely accurate at that time, so far as you know?

A. While I was gathering these cattle I was gathering for Mr. Kinney. I was working for him.

Q. You stated, I believe, that you cut them out for the Haley Live Stock Company, and I wanted you to explain your exact relation as you, at least nominally, understood it.

A. At that time I understood I was working for Mr. Kinney.

Q. And looked to him for you- pay at that time?

A. Yes, sir; but shortly afterwards I was at work for the Haley Live Stock Company. The company was incorporated about that time or before, but I had known nothing of it until after this time.

Cross-examination.

By H. B. JOHNSON, Esq.:

Q. You received a check to pay these taxes?

A. Yes, sir.

Q. From whom did you receive that check?

A. I received it from Mr. Haley.

Q. In person or by letter?

A. I received it in person.

Q. Did he come there and bring the check himself?
A. No, sir.
Q. Where did you get it?
—. I got it in Rawlins from Mr. Haley.
Q. When you paid over the taxes or this check for the taxes you asked for a receipt in the name of the Haley Live Stock Company?
A. Yes, sir.
Q. Now, up to that time, in all your conversations with Mr. Wilson and Mr. Breeze and any one holding the stock there, did you make any claim that all those cattle were the cattle of Mr. Kinney?
100 A. Yes, sir; while they were holding them up to this time.
Q. After this seizure? Do you remember the day of the seizure by Mr. Wilson?
A. I do not exactly. It was somewhere the latter part of July.
Q. Was it not on the 27th of July, early in the morning?
A. It was about that time.
Q. About daylight?
A. I do not know whether that was the exact date or not, but it was the latter part of July I know.
Q. Well, after that you undertook to serve a writ of replevin, did you not, or one of them—some one served a writ of replevin?
A. Yes, sir.
Q. In the name of Mr. Kinney?
A. Yes, sir.
Q. And you claimed the cattle then for Mr. Kinney, didn't you?
A. Yes, sir.
Q. When was that—in August?
A. That was in August; yes, sir.
Q. Now, is it not a fact, Mr. Rankin, that the first time you ever mentioned to Mr. Wilson or any one else the name of the Haley Live Stock Company was when you asked for this receipt?
A. Yes, sir; that was the first I knew of the matters.
Q. Was Mr. John Breeze there, the county attorney, at the time of that seizure?
A. I do not remember seeing him on the morning of the seizure, but I saw him that day several times during the day just after—shortly after.

JOHN A. TOURTELOTTE, a witness called in behalf of the plaintiff, being first duly sworn, testified as follows:

Direct examination.

By W. T. HUGHES, Esq.:

Q. Mr. Tourtelotte, you live in this city, I believe?
A. Yes, sir.
Q. You are a lawyer by profession?
A. Yes, sir.
101 Q. You and I office in adjoining rooms, I believe?

A. Yes, sir.
Q. How long have you lived in this city?
A. Since 1883.
Q. Are you acquainted with the Haley Live Stock Company?
A. I am.
Q. I believe you hold an official position with reference to it?
A. Yes, sir.
Q. For about what length of time?
A. Since—well, I think, it was since the latter part of 1888.
Q. When did you first hear this company mentioned?
A. I first heard of it being contemplated in the early part of 1887, when Mr. Haley was in the office, while I was in the office in the Tabor block consulting with you and Judge Coulter about the formation of the company.
Q. You fix that in the early part of 1887. After that and before its formation did you hear any conversations with reference to its organization?
A. Yes, sir.
Q. State, will you, all you ever heard about it; and, as near as you can, the times.
A. Well, the first time I heard anything about it was, as I stated, in the early part of 1887. Mr. Haley then came in with Judge Coulter and consulted with you and Coulter with reference to the formation of the corporation in the State of Iowa. He stated that his business was so extended, covering such a wide range of territory, that he could not himself manage all the details of the business, and he asked your general advice as to whether a corporation would be better than a partnership, because that would subject him to a good many liabilities and he could thereby manage it as a corporation without detailing upon himself the liabilities of a partnership; that is, I think, the proposition he made to you there at the time, and I think he asked you to incorporate it, and he asked with reference to the law of Iowa also, and he then stated that he
102 would consult his firm at Omaha or Council Bluffs, I have forgotten which.
Q. Did he give any pointed reason why he was inclined to an Iowa organization?

Mr. JOHNSON: We object to that testimony. Mr. Haley is here, and what he said back there I do not think is evidence.
The COURT: I do not think it is, sir. It is not competent to call for his statements.

Q. Do you remember who were the proposed incorporators at the time or any of the times prior to its organization?
A. Yes, sir.
Q. Who?
A. The proposed incorporators were Kinney, Haas, and Haley.
Q. Where did Mr. Haas live, do you know?
A. Council Bluffs.
Q. What is your position in the company?

A. Technically speaking, I am the Colorado agent. I am the proper person on which service is made upon the company.

Q. In Colorado?

A. In Colorado.

Q. Do you know who manages its business in Colorado?

A. Mr. Ora Haley.

Q. Where is the seat of its business chiefly?

A. Business is carried on in Routt county.

Q. You attended the hearing, did you not, here in the district court of Arapahoe county in August, 1888?

A. In the case of Kinney against ——?

Q. Yes, sir.

A. Yes, sir.

Q. That was the injunction matter?

A. Yes, sir.

Q. Before judge at chambers, was it not?

A. Yes, sir.

Q. On the motion to dissolve?

A. Yes, sir.

Q. Do you recollect Mr. Iles swearing on that occasion, testifying?

A. I do.

103 Q. Do you remember what he testified on that occasion?

A. I can give the substance of it.

Q. State the substance of what he testified.

A. Well, he testified that he was the chairman of the board of county commissioners of Routt county, and that Mr. Haley had entailed upon them a good deal of trouble and expense in their efforts to collect the tax that he claimed was due, and he said that Mr. Haley owed the tax, and he proposed to see that it was paid.

Q. Mr. Wilson, I believe, testified on that occasion?

A. Yes, sir.

Q. Do you recollect of having seen that document before (Ex. 8)?

A. Yes, sir; these documents I endorsed in my initials at the time.

Q. Where did you see that document first?

A. I saw it first at that hearing.

Q. Did you see it in the hands of Mr. Wilson, the county treasurer?

A. Yes, sir; in his examination it was presented to him and he was asked if that was a true copy of the treasurer's roll, and he said it was.

Q. The roll under which he had made the seizure?

A. Yes, sir.

Cross-examination waived.

E. NUCKOLLS, a witness called on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct examination.

By W. T. HUGHES, Esq.:

Q. Where do you reside, Mr. Nuckolls?
A. I am residing here at the present or out near Overland park.
Q. Where is your ranch?
A. Near Overland park.
Q. What is your business?
A. Cattle business and wholesale butcher.
Q. How long have you been in that business?
A. Since 1866. I drove cattle across from Nebraska City in 1866.
104 Q. Have you been residing in Colorado since?
A. Yes, sir.
Q. And in the ranch business ever since?
A. Yes, sir; more or less.
Q. I believe you are in the butcher business in this city?
A. Yes, sir.
Q. What kind?
A. No; in Leadville and Aspen.
Q. What branch of that business did you carry on in Leadville and Aspen?
A. What they call "wholesalers"—furnishing retail butchers with dressed beef.
Q. You formerly lived in Garfield county, did you not?
A. No, sir; my son is there, and runs our stock up there and lives there. My only residence is Leadville and Aspen, and part of the time in Denver.
Q. You wholesaled range cattle, did you not, considerably?
A. Yes, sir.
Q. And have for several years past?
A. Since 1866.
Q. Mr. Nuckolls, what would be the probable effect on some seven hundred head of cattle seized, say, the latter part of July and held under guard for a period of about twenty-five days?
A. That depends something on the parties that are handling them.
Q. Beef cattle, I mean, gathered for the market?
A. There is a big difference in men handling cattle, the way they are handled. Some men take charge of cattle of that kind and damage them a great deal more than others would. The handling of cattle is a trade, like most anything else, especially beef cattle. If they are handled rough and bunched, beef cattle in that time would be valueless so far as beef is concerned; would probably have to hold them over another year, and I question then, if they were steers, whether they would get fat and be marketable or not.
Q. Well, upon the supposition that reasonably careful men han-

dled them during this time, what would be the effect on them?

105 A. To hold a bunch of steers thirty days?

Q. Yes.

A. Does that include night herding or corraling them?

Q. Well, night herding, we will say.

A. Well, I would hardly know.

Q. Well, would it improve them any?

A. Oh, no. No, sir; it would damage them, in my opinion, a good deal.

Q. You say it would damage them a good deal?

A. Yes, sir.

Q. State as near as you can how it would damage them.

A. Well, I do not know much about these cattle. Were these a bunch of beef steers that were marketable and on the road being shipped to market?

Q. Yes. What would be the probable effect on some seven hundred head of beef cattle taken from the range and on the road to market if seized and put under guard for a period of twenty-five days?

A. What year was that?

Q. In 1888.

A. I should think from twelve to fifteen dollars per head.

Q. Now, I ask you, if reasonably careful men held them, what would be the damage? Did you figure on that basis?

A. Yes, sir.

Q. Well, supposing the men were not reasonably careful. Just take a promiscuous lot of men taken up that are not used to cattle and are holding those beef cattle under guard.

A. Well, I cannot make an estimate. It is altogether owing to the men. Now, we can get men to work for their board and work with cattle, but we generally pay about forty or fifty dollars per month to men to work with beef cattle, handling and driving them, &c. Of course, a bunch of cattle might be virtually ruined in that time through some carelessness of the men. But you may get together a bunch of beef cattle off the range and ship them, and you may handle them very carefully, and they will shrink more or less.

106 I know we have often had cattle go into Leadville—we sometimes butchered as high as a thousand head a month—and on the roads we would get ad men hold of them, and the cattle trailing from White river and over there would not be fat cattle, and other cattle would come in in good shape that were handled very carefully. I know my son, with a herd of steers, always has men especially for the night herding. He attends to bedding the cattle himself before going to bed—goes around and gets them to lie down. It is hard to tell what the damage would be to a bunch of cattle with a lot of men that don't know anything about them.

Cross-examination.

By H. B. JOHNSON, Esq.:

Q. Mr. Nuckolls, you say it is not practicable for men to take a herd of beef cattle and find the best grass and best feed and best water there in *in* the vicinity and guard those cattle for a period of twenty-five days and have them in just as good condition as when they started?

A. Yes, sir; I so testified.

Q. Don't you know and every cattleman know, Mr. Nuckolls, that cattle roaming at large will roam a great deal and work off the flesh—beef cattle?

A. No, sir; I don't know it.

Q. And don't you know that that same bunch of cattle roaming probably twenty miles a day when they are loose, if restrained and where the best feed is and water, will gain in flesh all the time?

A. I know in my own mind that they will lose, and my experience.

S. S. GREEN, a witness called in behalf of the plaintiff, being first duly sworn, testified as follows:

Direct examination.

By W. T. HUGHES, Esq.:

Q. What is your name in full?

A. S. S. Green.

Q. You live in this city, I believe, now?

A. Yes, sir.

Q. What is your business?

A. Stock business.

107 Q. How long have you been in that business?

A. Fifteen or eighteen years.

Q. Where have you operated chiefly?

A. In different sections of the State, but principally in Douglas county and part of the time in Garfield county.

Q. What particular branch of the business have you been following?

A. Well, raising cattle, buying and selling cattle, and shipping cattle.

Q. During this time have you had experience with range cattle and fattening and handling beef cattle upon the range?

A. I have to some extent.

Q. Mr. Green, what would be the probable effect upon some seven hundred head of beef cattle taken from the range ready for the market and on the road to market if seized by a score or more of men and kept on the ground for about twenty-five days, say, in the latter part of July to the latter part of August?

A. Well, the effect—I do not know as I understand the question exactly. Generally speaking, cattle will shrink when under herd, but so far as the effect on the value of the cattle is concerned it will

depend largely upon the price of cattle at the time they were held and largely upon the discount or advance in the market.

Q. We do not put the market element in; we are asking of the effect upon the animal, irrespective of the market value.

A. My experience has been that it is a hard matter to gather and herd a bunch of cattle or herd them after they are gathered for a time without having the cattle shrink more or less. Of course, it depends a great deal upon the range you have them on and the kind of men you have with the cattle.

Q. Could they be held and guarded at any place where they could not be damaged much under those circumstances?

A. I think not; I have never been able to do it.

108 Q. Well, supposing they were held practically under guard.

A. As I said before, it would depend more how they were handled. If they were taken on grazing ground at the proper time in the morning and let them graze proper and back to their water, they would not shrink as much as though they were herded closely. I do not know how these cattle were herded; my idea is that they would shrink probably fifty or sixty pounds to the head, the best way you could handle them; if the feed was not good and the cattle were not satisfied, they would shrink more; an animal will not do good, no matter how good the grass is, if the cattle are not contented; it is contentment that adds to the flesh.

Q. Well, now, is it calculated to induce contentment in such a herd if there are armed men riding around them and herding them together?

A. No, sir; I do not know as their being armed would have anything to do with them. Most of our cattle are used to seeing it—cattle in that section of the country—but if herded close, as I remarked before, they would shrink more than if they were allowed to roam.

Q. Well, herded with reasonable care they would shrink to the amount you have mentioned?

A. I think so; yes, sir.

Q. And whether they shrink more would depend on the way they were handled?

A. Yes, sir.

Q. If cattle are badly handled what would they shrink? That would depend upon how bad?

A. Men who handled a bunch of cattle as you say, they would shrink one hundred and fifty pounds in that time.

Q. Take large fat steers four or five years old.

A. They could be handled so they would shrink a great deal more, but it is not reasonable to expect any man employed with the cattle would handle them so that they would shrink that much.

109 Q. What would be the effect upon the market value in keeping them that way?

A. That would depend upon the market at the time they were taken.

Q. Without referring to the market itself—the market value of them.

A. The animal at that time of the year if he shrinks he is losing what he should be taking on in the twenty-five days, and that makes him a different class animal. If they are worth four cents a pound in Chicago it is put into the market at a different class; worth probably two or three cents.

Q. Then the shrinking animal takes a different classification from one that is not shrinking so much?

A. Yes, sir.

Q. Were you acquainted with the markets in July and August?

A. No, sir; I am not. I was at that time, but I have no recollection of them now.

Q. In your present experience from year to year how is the July market as compared with the August market?

A. It is generally a little better.

Q. How are the July and August markets compared with the September and October?

A. They are generally better, because in September and October we expect it to decline at that time.

Q. Do you know of any exception to the rule?

A. I do not believe that I do.

Q. The July and August market is a better market than later?

A. We usually consider. If we have cattle to go to market in July and August we expect to get more than at any other time, and we generally round up cattle and get them in by that time to get the advantage of the market.

Cross-examination.

By H. B. JOHNSON, Esq.:

Q. Do you think it is impracticable for men to take possession of about seven hundred head of cattle—that is, where they are
110 remaining there upon the range—and by the exercise of proper care in removing them gradually two or three miles a day from the place where they are taken and where the feed is bad for an aggregate distance of fifteen miles, where the feed is excellent and plenty of water, and there giving them practically all the liberty they can in addition to good feed and water, do you think under those circumstances cattle need to shrink?

A. No, sir; I do not understand that these cattle were herded while they were seized—the way he put the question to me. He put the question that they were seized while they were on the road to market. If cattle are being day-herded and held in a place where there was no feed and those cattle were to be held there for this twenty-five days and cattle roaming fifteen miles a day on good feed, they would be much better on that feed than the herd on no feed.

REED MATTHEWS, a witness called on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct examination.

By W. T. HUGHES, Esq.:

Q. Mr. Matthews, where do you reside?
A. I reside in Larimer county, North Park, Colorado.
Q. What is your business?
A. Stock-raising.
Q. What branch of the business particularly engages your attention?
A. Raising and buying and selling steers and shipping them.
Q. Handling and selling beef cattle?
A. Yes, sir.
Q. Shipping them?
A. Yes, sir.
Q. I believe you stated your ranch is in North Park.
A. Yes, sir.
Q. What market do you deal in?
A. Omaha and Chicago, generally. Sometimes in Denver.
111 Q. Mr. Matthews, what would be the probable effect on seven hundred head of beef cattle gathered in the latter part of July for market and on the road if seized by a score or men or thereabouts and held under guard for a period of twenty-five days?
A. In what year, sir?
Q. In 1888, in Routt county.
A. Well, I think that particular year it would be much greater than any year I know of. I should think it would be from thirteen to fifteen dollars a head, just that special year.
Q. In answering that you have taken into consideration the state of the market of that year?
A. Yes, sir.
Q. And the general effect upo- the salable value of the animal?
A. Yes, sir.

Cross-examination waived.

FRANCIS X. AICHER, a witness called on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct examination.

By W. T. HUGHES, Esq.:

Q. You live in the city of Denver, I believe.
A. Yes, sir.
Q. Have lived here for several years?
A. Since 1872, I believe.
Q. You have been in Colorado some fifteen or sixteen years, I believe?
A. Nearly eighteen.

Q. You were formerly in the butcher business in Georgetown?
A. Yes, sir.
Q. And in Omaha about 1878?
A. Yes, sir.
Q. What branch of the business have you been in since you have resided in Denver?
A. Trading in cattle; the wholesale business.
Q. Handling range cattle?
A. Somewhat.
Q. Beef cattle?
A. Yes, sir.
112 Q. I believe you are a ranchman, too?
A. Yes, sir.
Q. Where is your ranch situated?
—. In the White River country, in Garfield county.
Q. You have it stocked with cattle, I believe?
A. Yes, sir.
Q. During your residence in Denver you have been buying cattle and handling them all the time?
A. Yes, sir.
Q. In the wholesale way?
A. Yes, sir.
Q. Were you in the business in 1888?
A. Yes, sir.
Q. In this State?
A. Yes, sir.
Q. Were you acquainted with the state of the market during the months of July and August and September of 1888?
A. Yes, sir.
Q. State the condition of the markets during those months.
A. The market during July and the early part of August was from forty to sixty cents better—according to the class of cattle—than it was later on, in September and October.
Q. Do you mean by the hundred?
A. By the hundred.
Q. Well, you mentioned October, did you not?
A. September and October.
Q. Rather confine yourself just to the first week or thereabouts of September?
A. What we called a fall season. Ranch cattle get very low then.
Q. How are the July and August markets compared with the September and October markets?
A. As a rule it is better, because fat cattle are not so plenty.
Q. Do I understand, then, that if cattle are gathered and shipped early in August that generally more is realized for them than if gathered and shipped later?
A. Nearly always that is the case.
Q. Is there any exception to the rule since you have been in the trade?
A. Well, I remember one exception. That was when cattle were on the rise, I believe. It was in the summer and fall of 1876.

113 Q. You was not in the business at that time?

A. I was in the business in Georgetown at that time. That is the only exception I know of.

Q. I believe you said that in 1888 the declinations were from forty to sixty cents per hundred?

A. Yes, sir.

Q. What would be the probable effect upon the salable value of some seven hundred head of fat beef cattle, many of them four and five years old—range cattle, but gathered and on the road to market—in the latter part of July, 1888, if seized by a large number of men and kept on guard for a period of twenty-five days?

A. Well, I should think it would be an injury, depending on the way they were being held.

Q. Well, supposing that these men were unskilled men in the business, just a lot of men gathered together as circumstances would permit, and that these were the men who handled the cattle.

A. Men who do not understand cattle could not handle them to make them hold their own, to keep up in any condition at all. Unskilled men could not.

Q. Could any class of men hold them so they would not shrink?

A. It would be pretty hard to do.

Q. Could it be done?

A. Not with wild range cattle. It might be done with tame stock, but not with wild range cattle.

Q. What do you call "wild range cattle"?

A. Cattle running at large, as they do in Routt county.

Q. As it might ordinarily come what would be the damage per head on fat beef cattle held as I have mentioned?

A. They might shrink any way from two to four pounds a head per day, all according to the way the feed was and the way they were being held, besides the damages that would result from the falling in the price, and, again, the different class they would have to be sold in, from what they formerly would have been fitted

114 to go in on account of their condition. Cattle held from twenty-five to thirty days or even twenty days cannot possibly be expected to go in on the market as the same class of stock as those just gathered and taken right along.

Q. Then I understand you to say that such treatment would result in their being more cheaply classified?

A. Yes, sir.

Q. And that classification would not command a higher rate?

A. No, sir.

Q. How many classes have you in the trade?

A. That is pretty hard to tell you, Mr. Hughes, as to beef cattle. There is certainly more than two right along—"prime," "medium," and "thin."

Q. Well, Mr. Aicher, I will ask you to estimate, as near as you can under the supposition I have put, what would be the effect on a twelve or a thirteen hundred pound steer seized at that time of the year and held for the time I have mentioned.

A. What do you mean—in the way of his condition?

Q. Yes; the general condition.
A. Do you mean the condition all around?
A. Yes, sir; the gross declination in the value per head.
A. By reason of the shrinkage and falling off in the value in the market?
Q. Yes, sir; everything.
A. Well, it could not be less than fourteen to fifteen dollars a head. I can figure that out very easy.
Q. You may figure it if you desire.

Cross-examination.

By H. B. JOHNSON, Esq.:

Q. Can you tell or any one tell by looking at cattle whether they have recently been fleshier before—losing or gaining flesh?
A. A man can come pretty near telling that if he is an experienced man; yes, sir.
115 Q. Do you think it is impracticable for men to take cattle and move them where there is better feed and better water and give them plenty of liberty, so that they can roam around several miles a day and feed—do you think it is impracticable to restrain cattle in that way without injury?
A. I never saw a herd of range cattle that was held without injury that way, but it might possibly be done. I have never seen it. I have never had anything to do with a bunch of cattle that did not shrink in that way.
Q. Irrespective of the feed or water?
A. Yes; for if they are wild cattle they cannot be held and night-herded without injury.
Q. It is better for them to be roaming?
A. Better for them to be roaming at all times.
Q. Don't you know that wild cattle when they get fleshy and roam will lose flesh?
A. They never roam much when they get fleshy. It is not a fact that they run much when they get fleshy.
Q. Didn't they roam enough to lose flesh?
A. No, sir; it is not their nature.

Redirect examination.

By W. T. HUGHES, Esq.:

Q. Did you have dealings with the Haley Live Stock Company?
A. Yes, sir.
Q. How long have you been dealing with them?
A. I had dealings with Haley before the live stock company was organized.
Q. And do you remember about when it was organized?
A. The first intimation I had of it was when Mr. Haley got some money from me to help pay the taxes for the company along. I believe it was in 1888.
Q. You have bought of the company?

A. Yes, sir.
Q. Dealt with it right along?
A. Yes, sir.
Q. Since?
A. I have sold cattle for them and bought from them.

116 Recross-examination.

By H. B. JOHNSON, Esq.:

Q. He got money for his taxes?
A. Yes, sir.
Q. You gave him a check?
A. Yes, sir.
Q. He furnished collateral security to you?
A. No, sir; he stated that, but he is mistaken.
Q. You just loaned him the money?
A. If you want me to state just how it was done I can do so.

W. J. WILSON, a witness called on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct examination.

By W. T. HUGHES, Esq.:

Q. You reside in this city?
A. I do.
Q. You have lived in this State something like twenty years?
A. Yes, sir.
Q. Been in the cattle business all the time?
A. For twenty years; been all the time I have been in the State.
Q. Have you been raising and handling beef cattle and range cattle?
A. Yes, sir.
Q. And selling them?
A. Yes, sir.
Q. Mr. Wilson, what would be the probable effect on seven hundred head of beef cattle if seized by a body of men in the latter part of July, 1888, and held for a period of twenty-five days?

Mr. JOHNSON: We object to any more of this line of testimony; first, I think we have got enough of it; and, second, I do not think it is a matter of science. I think if the testimony is introduced as to how these cattle were managed, what their condition was when they were taken, and what the condition was when they were
117 turned over, that a jury can determine the extent of their injury just as well as an expert, and better.

The COURT: After you have examined this witness I think you had better not have any more of it.

Q. (Last question read.) I mean fat beef cattle, gathered for the market and on the road to market.
A. It would depend entirely on how they were handled. Of

course it is a part of the business that requires a great deal of science to handle beef cattle, more than any other part of the cattle business.

Q. Do you consider it a profession or trade to handle them right?

A. Yes, sir; or a natural talent. A man that has not the right disposition cannot handle them. It requires experience.

Q. Take a body of promiscuous men, gathered up in a frontier county; how could such a body of men handle that number of cattle and not damage them?

A. It would be almost an impossibility.

Q. Then the extent of the damage would depend upon the manner in which they were handled?

A. Yes, sir; I know of an instance that I can explain to you. I started from my ranch to a shipping point with a bunch of beef cattle——

Mr. JOHNSON: We object to your stating your experience.

Cross-examination.

By H. B. JOHNSON, Esq.:

Q. Mr. Wilson, suppose about seven hundred head of cattle have been already gathered and they are in a country where the feed is bad, and men who are familiar with the handling of cattle or living in a cattle country, you might say, they take them and judiciously handle them and move them at the rate of two or three miles a day for perhaps an aggregate distance of fifteen miles back to where there is splendid feed, the best in the country, and good water; now, is it not practicable to do that for twenty-five days and to have those cattle shipped in just as good condition as they were
118 in the first time?

A. When they were gathered off the range?

Q. At the time they were gathered, if they had been gathered.

A. Yes—well, in handling cattle in that manner we will say they were some time on poor feed.

Q. They were seized at a place where feed was poor, and they had been gathered and had been several days gathered and been where feed was poor. They had perhaps shrunk some already, but if they were taken and gradually moved back to where there was splendid feed and good feed and good water and given plenty of liberty, so that they could roam about for several miles each day, merely herding them so that they would not disband and scatter, could they not be, in twenty-five days, in just as good condition as when they started?

A. I have explained it from my own knowledge of the business, and it is this: In handling cattle the main object is to get the cattle on the range as early as possible, so as to get them located on good grass. Then, if it becomes necessary to change them from that good grass to different grass, in a different locality, a steer is not satisfied. He knows he is away from home and will fret. I know that to be a fact from being on the range and studying their nature. I have made that a study.

Q. Do you know Twenty Mile park?
A. I do not know it, sir.
Q. In Routt county?
A. No, sir.
Q. Don't you know that cattlemen frequently move their cattle during the season?
A. Yes, sir.
Q. For their improvement?
A. Yes, sir.

Redirect examination.

By W. T. HUGHES, Esq.:

Q. They generally move their cattle, do they not, early in the spring to locate them?
A. It depends on circumstances. I have moved in December, but because I have had to do it.

119 (Recess of five minutes.)

J. C. MCKAY, a *plaintiff* called on behalf of the plaintiff, being duly sworn, testified as follows:

Direct examination.

By W. T. HUGHES, Esq.:

Q. You live at Yampa, Routt county, Colorado, do you not?
A. Yes, sir; Craig it is called now.
Q. How long have you lived there?
A. I have lived at Craig about six months—at Craig. I moved from Yampa about six months.
Q. How long have you lived in Routt county?
A. I have been in Routt county two years and over.
Q. Are you acquainted with Mr. Thomas Iles?
A. Yes, sir; I know Mr. Iles.
Q. Mr. Thorpe?
A. Yes, sir.
Q. Were you acquainted with him in 1888?
A. I met Mr. Thorpe in 1888. I have been acquainted with Mr. Iles some time before I have been with Mr. Thorpe.
Q. Did you see either or both of these gentlemen during the months of July and August, 1888?
A. I first met Mr. Thorpe about the 25th of July, 1888. We met in Egeria park.
Q. Do you remember the incident of the seizure of some seven hundred head of beef cattle over there to pay Mr. Haley's taxes?
A. Yes, sir.
Q. As it was called along about that time, did you hear Mr. Thorpe or Mr. Iles say anything about it?
A. When I saw Mr. Iles that time he told me—I had been out to dinner and he came in and handed me a letter and instructed me what to do with the letter, and he told me they were going to round

up the Haley cattle again; that the commissioners had had a meeting the 1st of July and had intended to instruct Mr. Wilson.

Mr. JOHNSON: We object to his stating what Wilson done.

120 The COURT: I think he may answer it.

A. He said the commissioners had had a meeting the 1st of July and they had instructed Mr. Wilson to go ahead and round up the cattle again, and he understood that they had about six hundred head of beef cattle on Fortification creek, and I made the remark to him, "Why don't you round up the stock cattle and not bother the beef?" He says, "It will fetch Haley to time sooner by taking the beef cattle."

Q. That was Mr. Thorpe said that?

A. Yes, sir.

Q. Was he an acting county commissioner at that time?

A. Yes, sir; he was a county commissioner at that time.

Q. Proceed with the story, whatever there may be of it.

A. That is about the amount of it that I had with Mr. Thorpe. Well, afterward I made the remark—I says, "Haley will get out another injunction," and he says, "We are not going to pay any attention to any injunction any more." That was all the conversation I had with Mr. Thorpe in regard to it.

Q. Did you ever have any conversation with Mr. Iles?

A. Mr. Iles came past my place about the 1st of August. I cannot remember whether it was the very last days of July or the first of August that he came past my place. But Mr. Iles and I got to talking about the Haley round-up, and he said he was on his way down then to the round-up. The Haley round-up was on Fortification creek; somewhere up there. He said he was on his way there, and the matter naturally came up in regard to it, and I asked him if he did not think the county might get into trouble some way in rounding up the cattle and not paying any attention to any injunction, and he said he did not think they would; that they were determined not to pay any attention to any more injunctions; they were going to sell the cattle any way.

121 Q. Then you had a talk with Mr. Iles?

A. Yes, sir; I had a talk with Mr. Iles in regard to it and he made these remarks while talking to me about not paying any more attention to any more courts with regard to injunctions about the cattle—that is, from stopping the sale of the cattle; they were going to round up the cattle and sell them any way, and he said that they had instructed Mr. Wilson not to pay any attention to any more injunctions—the board of commissioners had.

Cross-examination.

By H. B. JOHNSON, Esq.:

Q. What is your business over there?

A. Well, I am in the hardware business.

Q. What was it then?

A. Hardware and cattle together. My business at that time was dealing in hardware to some extent and cattle at the same time.

Q. You ran a saloon there?

A. Yes, sir; I ran a saloon at that time.

Q. Is it not a fact that Mr. Thorpe and Mr. Iles merely said that under several of their injunctions they had improperly released the cattle when an injunction was served on them, and that if any more injunctions were served they would simply hold the cattle until they could try the injunction?

A. They made just that remark to me.

Q. Answer my question. Is it not a fact that they stated what I repeated?

A. No, sir; they did not state it in that way.

J. C. KITTELL, a witness called on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct examination.

By W. T. HUGHES, Esq.:

Q. Mr. Kittell, you live in Routt county, I believe?

A. Yes, sir.

122 Q. You live over there near Mr. McKay?

A. In that vicinity.

Q. You have lived there for several years, have you not?

A. Yes, sir.

Q. You know Mr. Iles?

A. Not personally; I know him by sight.

Q. Did you know him during the year 1888?

A. Yes, sir.

Q. Do you recollect seeing Mr. Iles along about the last of July or the first of August, 1888?

A. Yes, sir.

Q. Have you any recollection of a conversation you had with Mr. Iles with reference to what was called over there the "Haley round-up" about that time?

A. Yes, sir.

Q. State all about that conversation; how it came about and what Mr. Iles said.

A. Well, it turned up this way: I was building fence along the road, and Mr. Iles came along, and they were holding the cattle then over there, and they had some trouble about the cowboys trying to drive them off, and he stopped there talking with me and Mr. Green, and we were asking him about the round-up and what he was going to do about it, and, of course, he was telling us about it. He gave Mr. Wilson, I believe, orders to do it, and he said they told him not to obey any injunctions and not to give the cattle up for a whole wagon-load of injunctions, and to hang to them as long as there was a hair to hang to them by; that if it was necessary, to place outside guards and hold them. Those were about the words that were used.

Q. He referred to the running off of those several hundred head of beef cattle that has been mentioned?
A. Yes, sir.

Cross-examination waived.

JOHN A. COULTER, a witness called on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct examination.

By W. T. HUGHES, Esq.:

Q. You are a lawyer, I believe, Mr. Coulter?
A. Yes, sir.
123 Q. You have something of a residence in Routt county, have you not?
A. Yes, sir.
Q. Been a resident there for some several years past?
A. Yes, sir.
Q. You formerly lived at Georgetown, did you not?
A. Yes, sir.
Q. You own a ranch in Routt county?
A. Yes, sir.
Q. Acquainted with Mr. Haley?
A. I have known Haley for some time.
Q. You know Mr. Iles?
A. Yes, sir.
Q. And John M. Breeze?
A. Yes, sir.
Q. Lemuel Breeze?
A. Yes, sir.
Q. Mr. Thorpe?
A. Yes, sir.
Q. And Mr. Samuel H. Wilson?
A. Yes, sir.
Q. You represented Mr. Haley, did you not in 1886 and later?
A. Yes, sir.
Q. Are you acquainted with the Haley Live Stock Company?
A. I am.
Q. What has been your acquaintance with it?
A. I have been with the company. They have been doing business in Routt county for a year and a half or more.
Q. What kind of business?
A. Grazing and marketing cattle and taking care of them and branding, and such things necessary to a cattle ranch and a cattle herd.
Q. Anything beyond the cattle business strictly?
A. I think not. I do not know anything further than that.
Q. Did you ever confer with Mr. Haley about the incorporation of the company?
A. I have on several occasions.

Q. State when you first talked to him about it and what was said.

A. In the latter part of December I was employed by Mr. Haley to look after his law interests, and I left Georgetown to go to Routt county, and I went by way of Rawlins. I met Mr. Haley at Laramie City, Wyoming, and on our way in—we traveled from there
124 into the ranch from Rawlins down to about one hundred and twenty-five miles—somewhere in that neighborhood—and in going down I suggested to Mr. Haley at that time the absolute necessity for a corporation for the purpose of handling his immense herd, and pointed out to him the advantages he would receive from having a corporation. One of the reasons that was given was that Hahn's Peak being the county-seat of the county, and now at this season of the year almost inaccessible, that it was hardly possible that any process he might want from that court could be issued; that it was impossible for any attorney that had any respect for his life to go there at that season of the year, and that it continued until about the 1st of July, when the winter snows go down in the spring, and that up to that time no news could be got from the clerk of the court, or anything of that kind; that he had better have his head office where we could get at the courts; then he was doing business in Wyoming and all along the line from here to Chicago; that he could manage a corporation much easier than he could that business in his own name. He talked over that matter frequently, and up to the time I severed my connection with him as attorney, about two years ago, he was still of that mind then and said he would consult with his attorneys on the outside at Laramie and Rawlins or at Cheyenne. He always contemplated the organization of a company and doing business in that capacity rather than in his own name. The organization of it or the consummation of the organization, I had nothing to do with it.

Q. You mentioned the fact that you were attorney for Mr. Haley about 1888?

A. I was.

Q. I believe you brought one or two suits for Haley or attended them for him?

A. I attended several for him.

Q. Those were injunction suits, were they not?

A. Yes, sir.

Q. Mr. Coulter, were you not at Hahn's Peak in September, 1888?

125 A. Yes, sir; I have been there several times before and since that time.

Q. Do you recollect examining the treasurer's roll at Hahn's Peak in September, 1887?

A. Yes, sir; I recollect examining it in 1887; September, 1885; October, 1885; October, 1886, and most every year since.

Q. What difference did you find the treasurer's roll in?

A. When?

Q. At Hahn's Peak in September, 1887.

A. What time in September?

Q. The 12th or 13th of September.

Mr. JOHNSON: We object. We do not think that the witness ought to be permitted to testify about the changes appearing in that record. The records themselves could have been brought here as an exhibit to the court and jury.

The COURT: You may save an exception and proceed.

To which ruling of the court the defendants, by their counsel, then and there duly excepted.

A. I found that the record had been changed—that is, the assessor's roll had been changed. We had had a great deal of trouble. In every contest we had we would find the treasurer's certificate offered in evidence against us——

Mr. JOHNSON: We object to his introducing troubles outside of this case.

The court overruled said objection.

A. Every time that we had any hearing a certificate was brought up, and I have seen four or five of those certificates and no two of them were alike, and the one on the 13th I had to procure a certified copy from Mr. Voice. I wrote to the treasurer of Routt county, Mr. Breeze, at that time, to get a certified copy of the assessor's roll in regard to the Haley taxes for 1884. That was sent to us, and I went over in 1885, and after we had compared the certified copy given by Mr. Voice they did not compare. I asked Mr. Voice what the trouble was and he told me how that came to disagree.

126 Q. What did he tell you, or what was Mr. Voice?

A. He was county clerk and recorder, and also deputy treasurer.

Q. Who was treasurer?

A. Louis H. Breeze.

Q. And Mr. Voice was deputy treasurer?

A. Yes, sir.

Q. What did he say?

A. ——.

Mr. JOHNSON: We object to what he said.

The court overruled said objection.

A. Mr. Voice says—told me that Mr. Lewis Breeze and John Breeze returned from Fort Collins, and came up there and asked him to make the change in the record so as to make it comply with some decision that you introduced at the hearing some two or three days before at Fort Collins. Voice said he had no right to change the record and would not do it, and said that Lewis H. Breeze afterwards admitted to him that he did it—had made the change; that is why my certificate and the books did not agree. I then compared that with the other certificates that had been introduced and they had no more resemblance to the record than the Denver "News" has——

Mr. JOHNSON: We object to that line of testimony.

The COURT: I do not think the witness can state that.

The objection is sustained to the witness'es illustration. The witness should not give such an illustration.

Q. Mr. Coulter, where did you see the first office copy of that treasurer's roll?

A. I saw it at Hayden on the 7th or 9th of January, 1886.

Q. Who certified this office copy?

A. Louis H. Breeze.

Q. The treasurer?

A. Yes, sir.

Q. It was the treasurer's certificate or an office copy?

—. Yes, sir.

Q. You have not a copy of that, have you?

A. No, sir. I wanted a copy and was informed by the
127 county attorney and justice of the peace that I was not allowed to touch the papers.

Q. Where did you first see the office copy of that roll?

A. At the hearing before Judge Carpenter, on the 12th day of February, 1886.

Q. What kind of a hearing?

A. The hearing on the motion to dissolve the injunction before Judge Carpenter, at chambers, in Golden.

Q. In the Clear Creek county case, held at Golden, on the motion to dissolve the injunction?

A. Yes, sir.

Q. Is that the office copy you saw at Golden before Judge Carpenter (shows witness copy certified by W. A. Dier and marked Ex. 6), at his chambers, in 1887?

A. Yes, sir; that is a copy of the office copy.

Q. Mr. Dier made that copy, did he not?

A. Yes, sir.

Q. Did you compare that copy with the office copy they presented?

A. Mr. Dier and myself compared them.

Q. Is that a copy of the office copy that — introduced by the Breezez in evidence?

A. Yes, sir; it is.

Q. Where did you see that document (Pl'ff's Exhibit 7)?

A. I saw the certificate of which this is a copy at Fort Collins?

Q. When?

A. Some time in June, I think—about the 27th of June, 1887?

Q. Now, that is a copy of the office copy, is it not?

A. Yes, sir.

Q. What office copy?

A. The office copy that was introduced at the hearing there before Judge McAnely, at the trial that was held there on a replevin suit in which Ora Haley was plaintiff and Mr. Elliott was defendant.

Q. You say you compared that with the office copy they introduced?

A. I did.

Q. And do you know that to be a copy of that office copy?

128 A. I do, for I recognize the paper.

Q. You spoke of having seen another one?

A. Yes, sir.

Q. You was not present at Aspen, were you, before Judge Rucker, at chambers?

A. No, sir; I was not. I never saw this exhibit (Pl'ff's Ex. 8).

Q. Mr. Coulter, did you ever examine the assessment-roll of Routt county for 1888—the tax-payers' names—under the letter "H"?

A. I have; yes, sir.

Q. Did you ever examine Mr. Haley's assessment?

A. Yes, sir.

Q. What document have you there? (Hands paper to witness.)

A. This is a certified copy of the assessor's roll at one time.

Q. Did you ever see that copy before?

A. Yes, sir.

Q. Have you had it in your hands frequently?

A. I have.

Q. Did you ever compare that with the original record?

A. I have.

Q. Is that a copy of the original record?

A. I presume it was at one time, but it was not at the time I compared it. This is the paper I spoke of when I was there on the 13th or 14th of September, 1887, and which Mr. Voice sent to us so that we could have a copy of the paper coming officially from Voice, and in September we took this paper and compared it with the books and we found a change in it under letter "H."

Q. What do you mean by that?

A. I mean that when we examined it that time under the letter "H" these "dollar-" and "cents" were put in.

Q. Are you referring to the original assessment-roll or to the treasurer's roll?

A. The treasurer's roll.

Q. What is that a copy of?

A. I think that is—I think it is the assessor's roll that I had the last time.

Q. Did you ever compare that with the assessor's roll?

A. Yes, sir.

Q. To see if it was a copy.

A. Yes, sir.

129 Q. Is it not a copy of the assessor's roll?

A. Yes, sir; that is a copy of the assessor's roll. I have seen that.

Q. Did you find that to be a true copy of the assessor's roll?

A. I have compared it. I compared this with the one that has been introduced in evidence and which was in Breeze's hands. I never saw the original in Mr. Voice's hands in the world. I have compared this with one of the Breezes. It compares with the

assessor's roll. It is the one that was in *the* Breeze's hands that he said was original.

Q. You made a close comparison to see if it was a copy?

—. Yes, sir.

Q. You spoke of all the records being changed. What do you mean by that?

A. I mean that the treasurer's roll or treasurer's warrant has been changed from the way they are under every letter since 1887.

Q. To what extent was the change in 1887?

A. It was only changed in 1887 under the letter "H."

Q. Are you acquainted with Samuel H. Wilson?

A. Yes, sir.

Q. Did you see him at Hahn's Peak in 1887?

A. Yes, sir; I did.

Q. In September?

A. Yes, sir.

Q. Do you know of his intention having been called to the altered record and altered treasurer's roll at that time?

A. I do.

Q. State the circumstances of it.

A. At the time we had the certified copy from Mr. Voice, as deputy treasurer, I had, prior to that time, examined it and called the attention of Mr. Wilson, Judge Rucker, Mr. Beecher, district attorney; Mr. Johnson, Mr. Hughes; and Mr. Haley and several other gentlemen called in there, and this change was pointed out to them, and in conversation with Mr. Wilson he said he did not think any change of that kind would make any difference at all in regard to the roll; that the treasurer had a right to change it whenever he saw fit.

130 Q. You mean the present treasurer, Mr. Wilson?

A. Yes, sir; the present treasurer.

Q. The same person who made the seizure of these cattle in July, 1888?

A. Yes, sir.

Q. You are acquainted with Lemuel Breeze, I believe you said?

A. I am; yes, sir.

Q. Did you see Mr. Lemuel L. Breeze during the month of October, anywhere in the State, in 1887?

A. I presume that I did. I was there off and on most of the time.

Q. Did you attend court at Glenwood Springs in October, 1888?

Q. Yes, sir.

Q. Did you see Lemuel L. Breeze there?

A. I did.

Q. What court did you attend there?

A. The district court.

Q. Held by Judge Rucker?

A. Yes, sir.

Q. Did Lemuel Breeze attend court there?

A. He did.

Q. He is an attorney there?

A. One of the attorneys.

Q. A brother of John M. Breeze?

A. John M. Breeze, and Lemuel, who is a brother and attorney of John M. Breeze.

Q. How do you know that?

A. I have heard him say that.

Q. At the court in Glenwood Springs, in October, 1888, did you hear Mr. Lemuel Breeze make any judicial declarations before the court as to the changed records or the effect of them and the authority to change them, &c.?

A. I did.

Q. State where that was said and the circumstances.

A. There were two cases pending before Judge Rucker, in the district court of Garfield county, at that time. He made an application for a change of venue, and in presenting the motion to the court Mr. Lemuel Breeze stated that Lewis Breeze had made the change in the record. To suit the views of himself and his brother was why the record was changed.

131 Q. Was that before the court?

A. Yes, sir; on a motion for a change of venue.

Q. To Arapahoe county?

A. Yes, sir.

Q. With that explanation to the court?

A. Yes, sir.

Q. Can you state how the matter arose, this motion for a change of venue—change of venue from where?

A. In September these cases were set for trial or called up for action in Routt county, at Hahn's Peak, and there was some delay occasioned, and by stipulation between Mr. Breeze and myself and yourself the venue of the cases were changed to Garfield county, and by order of the court they were set for trial on the 17th of October of that year, and Mr. Breeze comes in and contests the motion for a change of venue, alleging certain causes, and in presenting that motion to the court Lemuel Breeze, for John Breeze had nothing to say in the presentation of that motion, stated to the court that this record was altered under and by direction of himself and his co-counsel.

Q. You know Thomas H. Iles?

A. Yes, sir.

Q. Did you see him in Routt county during the year 1889?

A. Yes, sir.

Q. At Hahn's Peak?

A. Yes, sir.

Q. Did you hear Mr. Iles make any declarations with reference to this seizure and changing the records in that county by authority of the county board, &c., or anything relative to that?

A. Yes, sir.

Q. State all that was said there by Mr. Iles.

A. Mr. Iles said that he stated there that he thought at that time, the time of the seizure, the board of county commissioners had ordered Mr. Wilson to proceed and move upon this property and

take it by force, if necessary, and that the county commissioners had directed him, because it was in his district where the
132 cattle were roaming, and that he assume to give it his personal supervision and direction.

Q. Well, you know John M. Breeze?

A. Yes, sir.

Q. Do you recollect meeting him at Hahn's Peak in September, 1887?

A. Oh, yes; I think I met him there nearly every year for the last four or five years.

Q. Do you recollect hearing Mr. John M. Breeze say anything about the immateriality of the changes in the records or, in other words, the authority to the treasurer to make that, and the circumstances under which they were made?

A. He stated, I think, to yourself and myself that he considered the treasurer had the right to change the records from the treasurer's roll or the treasurer's roll whenever he saw fit. There were present Mr. Lemuel Breeze, John Breeze, yourself, and myself, in front of the recorder's office, in Hahn's Peak.

Cross-examination.

By H. B. JOHNSON, Esq.:

Q. You had a conversation, you say, with Mr. Haley in 1885?

A. Yes, sir.

Q. How long had you known him then?

A. I think that I first met Mr. Haley in 1884. That is my impression.

Q. You were the attorney of Mr. Haley at the time of this conversation?

A. Yes, sir; the conversation I refer to. The conversation I think you refer to was in the first of 1886, about the 1st of January.

Q. Your litigation over those taxes of 1884 was commenced in 1885?

A. Yes, sir.

Q. And you are the attorney for Mr. Haley?

A. I was at that time.

Q. And there was some talk about forming a corporation?

A. Yes, sir.

Q. The county-seat was a little inaccessible, was it?

A. It is now.

133 Q. Was it any more inaccessible to Mr. Haley, who resided there in the county, than it would be to an Iowa corporation?

A. Yes, sir; I would rather attend court business here in Denver than to attend court business over there.

Q. What difference would it make?

A. Because I can go from where Haley's place is in the same length of time from there here or quicker than I can from that place now in this season of the year.

Q. How would an Iowa corporation do it—any foreign corporation?

A. Any foreign corporation can do business there or anywhere; yes, sir; in any court where it is most convenient.

Q. Could not Mr. Haley commence where it is most convenient?

A. I presume he could, sir.

Q. Then what difference would it make, even if it was a corporation, so far as the inaccessibility of the county-seat is concerned?

A. Probably I stated he had to be there in his business, and things in that way.

Q. Mr. Haley is really a non-resident of the State, is he not?

A. I think he has a home there in Routt county.

Q. He does not claim to be a citizen of Colorado?

A. No, sir; I do not think so.

Q. And he is a citizen of Iowa?

A. Yes, sir; I think so.

Q. Didn't you discuss the matter with him that if it was a foreign corporation actions could be brought in the United States courts?

A. No, sir; I did not.

Q. Do you mean to say as a lawyer that a foreign corporation could bring a suit in Denver in the State courts any better than Mr. Haley could?

A. No, sir; I do not.

Q. Well, then, what difference would it make as to whether it was a corporation or whether it was Mr. Haley, so far as the
134 place of trial is concerned?

A. It was considered more convenient for him, and therefore it was afterwards discovered that he could go into the United States courts; more convenient by being a foreign corporation than it could be by being a domestic corporation.

Q. But, notwithstanding all that, he did not organize the corporation in 1885?

A. I never talked with him in 1885.

Q. Well, in 1886?

A. In 1886—the corporation was not organized when I was attorney.

Q. You got out an injunction in 1885?

A. Yes, sir.

A. And that was dissolved after a time?

A. Yes, sir.

Q. You then got out an injunction for the same purpose from Judge Carpenter, didn't you?

A. No, sir.

Q. Well, some one did. Was you not the attorney in that case?

A. No, sir.

Q. Didn't you get out an injunction before that court?

A. Before what court?

Q. Before Judge Carpenter

A. I got out one injunction before Judge Carpenter.

Q. Judge Carpenter refused to dissolve the injunction, did he not?

A. The one that I got out he did.

Q. Your case went to the supreme court?

A. Yes, sir.

Q. And the supreme court dissolved the injunction and decided that it was the duty of the county to collect that tax?

A. No, sir; I do not think that they decided anything of that kind.

Q. Have you ever read that decision?

A. I have.

Q. Do you say that is not in it?

A. That is my recollection of it, sir.

Q. Then you went and got out another injunction, did you not?

A. No, sir.

Q. Before Judge Rucker?

A. I did not.

135 Q. Well, some one did.

A. There was an injunction, I understood, granted by Judge Rucker.

Q. Was you not in that last case?

A. No, sir.

Q. That went to the supreme court?

A. Yes, sir.

Q. And again the supreme court dissolved the injunction?

A. They dissolved the injunction and the case is now in the Supreme Court of the United States.

Q. Then you went to work and got out two more injunctions in the State courts, did you not?

A. I did not know that until I heard it here to-day.

Q. During all these phases of the litigation Mr. Haley did not organize his company, did he?

A. He did not organize the company until a year ago, or more.

Q. Don't you know that that last decision of the supreme court was rendered about the 15th of June?

A. I do not, only that it was rendered some time in the May term.

Q. Don't you know that the attorneys of Mr. Haley thereupon telegraphed to him in Wyoming, and on the same identical day he made this fraudulent bill of sale to Mr. Kinney?

A. I do not know it. I was not here and was not present.

Q. Then you were not consulting Mr. Haley at that time?

A. I was not; no, sir.

Q. You say that the treasurer's roll over there — not changed?

A. Yes; it has been changed twice or three times.

Q. Do you mean it was at different times or in two or three places?

A. On two or three different occasions.

Q. Please state what those changes were.

A. The first change that I observed was that they put dollar points—they first had the dollar-mark, and then wrote "dollars"

over the head, and then "cts." where the cents should be,
136 and then in the treasurer's roll, on the back, you will find by the first examination that the figures are carried out here under their respective head- of the different taxes, State, county, school, &c. They appear along there just the same as any taxes that have been footed up. Now, you will find two rows of figures right opposite to his name, with no description of property—or that appeared so at one time—if any description of property that has been added in by some one, and this other row of figures runs right along over the other figures; the original figures have been scratched out and others put in their place and in different ink and others added on top.

Q. Do you mean to change the amount of the assessment?

A. I do not know whether it changed the amount of the assessment or not; it shows it has been changed; then another change which I noticed at different times, which was last fall, in the examination of the books, is that the whole book has been changed from beginning to end.

Q. We are speaking now of this particular assessment?

A. I am speaking of the assessment and the book of 1884.

Q. Now, you say that Mr. Breeze told you that this amendment of the return was made by indicating what these figures fixing the valuation, &c., meant, and the amount of the taxes, by indicating that these figures meant dollars and cents and done under his advice.

A. Which Breeze do you mean?

Q. Which do you mean?

A. You assume a question and said Mr. Breeze. Which one do you mean?

Q. Which one do you mean?

A. I mean John Breeze, and Lemuel Breeze told me.

Q. John Breeze was county attorney?

A. Yes, sir.

Q. Did he not refer you at the time to section 2926 of the General Statutes, providing that "Omissions, errors, or defects in form in any assessment-list or tax-roll, when it can be ascertained
137 therefrom what was intended, may be supplied or corrected by the assessor at any time before the return of the assessment-roll to the treasurer or by the treasurer at any time after the receipt of the said roll by him; when any omission, error, or defect has been carried into a delinquent list, or any error appears in any publication, the list or publication may be amended by the treasurer and republished as amended." Don't you know that under this case the authorities there have claimed the right at any time and exercised it merely to supply clerical errors, to indicate that these figures meant dollars and cents, which any man of sense knows anyway?

A. Are you asking the question as a legal proposition?

Q. Yes, sir; if you claim to be one.

A. I have made no claim, one way or the other, so far as that

is concerned, Mr. Johnson. I do not think that any officer has a right to deface a public record, even under the statute.

Q. That is your opinion?

A. Yes, sir.

Q. Even under the statute?

A. Yes, sir.

The COURT: I do not want to hear such an examination as that, Mr. Johnson.

Q. Well, you may state whether or not there were any charges made in that roll except to indicate that the figures in the columns indicated dollars and cents, to make that more plain and certain.

A. At present I do not recollect anything further than I have stated.

Q. You drew the first bill, didn't you, in bringing the suit for an injunction?

A. No, sir; I did not.

Q. The bill that went first to the supreme court?

A. I drew that bill, but that was not the first bill.

Q. Didn't you allege that the assessment was so many dollars and so many cents in that bill?

A. I do not recollect.

138 Q. Would any man of common sense have any difficulty in understanding from that roll, before it was changed, that those figures meant dollars?

The COURT: That will do. Do not ask any such questions as that.

Q. Then would any man of reasonable intelligence have——

The COURT: Don't ask any question like that. Take your exception if you are not satisfied with the decision.

Thereupon defendants, by their counsel, duly excepted to the ruling of the court.

Redirect examination.

By W. T. HUGHES, Esq.:

Q. Who brought the first suit in 1885?

A. Mr. Brockway.

Q. And in one of them was not Croxton and Brockway the attorneys?

A. I am not familiar enough with that case to say much about it.

Q. That injunction matter was disposed of by Carpenter?

A. Yes, sir.

Q. Because a non-resident brought a suit without filing a cost bond?

A. Yes, sir.

Mr. HUGHES: I wish to offer in evidence this paper to show that the board of county commissioners of Routt county gave no notice as to when the board of equalization would be in session.

Mr. JOHNSON: We object because the law nowhere provides that

any such thing shall be made a matter of record and never was made a matter of record in any county of the State. It is a notice published in a newspaper under the statute, and there is no provision for recording it anywhere. It is immaterial and incompetent.

139 The court overruled said objection and admitted said paper, which is thereupon marked Exhibit P 10. Said paper is a record, duly certified, of the meetings of the board of county commissioners of Routt county, Colorado, from and including the April meeting of 1884 to and including the October meeting of the same year, and said certified copy fails to show that any notice was ever given by said board of commissioners of any meeting of the board of equalization of said county for said year.

Mr. HUGHES: I will offer in evidence the assessment-roll of Routt county for 1884 concerning Ora Haley.

Mr. PARKS: The defendants object because immaterial, incompetent, and not properly certified.

The court overruled said objection and admitted said paper, which is marked Exhibit P 11, and is in words and figures following:

Name.	Lands, description of.	No. of acres.	Value of lands.	Value of improvements.	Value of improvements on public land.	No. of horses.	Horses' value.	Mules.		Cattle.		Carriages.		Capital in merchandises.	Amount of all property.	Total.	
								No.	Value.	No.	Value.	No.	Value.				
Haley, Ora.....	Six ¼ sections.....	960	2,880	900	800	165	6,845	2	100	7,000 8,200	143,130 163,000	3	200	200	175	155,230 175,100	Lay.

STATE OF COLORADO, }
County of Routt, } *ss:*

I, I. G. Voice, county clerk and recorder of Routt county, Colorado, do hereby certify that I have carefully compared the above with the assessment-roll for the year 1884 for said county and State, and that the above is a precise, exact, and identical copy of said roll of the assessment of Ora Haley's assessment for said year as now remains of record in my office.

Witness my hand and official seal this 20th day of April, 1887.

[Seal Routt County, Colorado.]

I. G. VOICE,
Clerk and Recorder for Routt County, Colorado.

Ex. P 11.

141 Plaintiff rests.

And thereupon the defendants, to maintain the issues on their behalf, gave in evidence as follows:

Mr. JOHNSON: We wish to enter a demurrer to the evidence, if it is substantially all in.

(Recess until 2 p. m.)

Mr. JOHNSON: I now desire to file a demurrer to the evidence and will read the same to the court.

Mr. TELLER: If he files a demurrer, then the jury should be discharged.

The COURT: I suppose if the demurrer is overruled the jury are directed to find. That is my understanding.

Mr. JOHNSON: If the demurrer is overruled I understand we put in our evidence.

Mr. TELLER: No, sir; you do not.

Mr. JOHNSON: It is only a demurrer to the evidence. It is not intended to discharge the jury at this stage of the case. It is a demurrer to the evidence and a motion to dismiss the case on the evidence of the plaintiff.

Mr. TELLER: If he demurs to the evidence he must stand by the legal effect of the demurrer. We join issue with him on the demurrer and ask for a ruling of the court.

Mr. JOHNSON: Then I will move the court to direct a verdict for the defendants in the above-entitled cases upon the evidence of the plaintiff, and for these reasons——

Mr. TELLER: We object. He has demurred to the evidence, and he must be bound by it.

The COURT: He has not filed it yet. He is not committed to that so far but that he can withdraw it.

142 Mr. JOHNSON: First, that the testimony introduced by the plaintiff shows that the plaintiff corporation was organized and a conveyance made by Haley to Kinney and from Kinney to that corporation for the purpose of creating a plaintiff and making a case for the cognizance of the United States court; second, because it appears from the evidence of the plaintiff that the property in question, upon which the alleged trespass was committed, the date of which is fixed in the complaint and in evidence as July 27th, 1888, was never conveyed to the plaintiff, and it never acquired any title to them at all until after the date aforesaid, and therefore it could not sue for an alleged trespass committed upon it as of the date that it was committed and proven; third, because it clearly appears from said evidence that the pretended conveyance- from Haley to Kinney and from Kinney to the plaintiff were made without consideration and were actually fraudulent; the sales were sham sales and had no effect of vesting this property in either Kinney or the plaintiff; fourth, because it appears from the evidence that there had been no delivery of this property or pretended de-

livery of any kind of this property to the plaintiff prior to the alleged trespass,

And thereupon follows argument of counsel for respective parties, and said motion is taken under advisement by the court.

Adjourned to Monday, Jan'y 27th, at 10 a. m.

MONDAY, *Jan'y 27th*, 1890—10 a. m.

The COURT: The motion is presented to the court to in-
143 struct the jury to find for defendant- in the two cases on trial. Some of the questions are very perplexing. I have no difficulty — as to the matter of ownership and possession of this property at the time of the seizure, on July 27, 1888. It is very clear that the plaintiff had not acquired the title or possession at that time, and, as trespass cannot be maintained without ownership on the part of the plaintiff or at least the possession of the property, the actions cannot be maintained as to the seizure of the cattle and the loss accruing to the plaintiff from that act.

The remaining question under these complaints is that the plaintiff may maintain an action for the money paid to procure a release of the cattle. The evidence so far tends to prove that this was paid by the plaintiff in the suit, and if it be assumed that the plaintiff was paying it for Kinney or whoever was the owner of the cattle at that time to secure the release of them with a view of holding them and acquiring property in them I see no serious objection to the proposition that the action may be maintained by the plaintiff to recover this money. The circumstance that the plaintiff was a stranger to the proceeding to collect the tax—that is, the tax was not levied against it, not recoverable against it—is not material, as it seems to me. If the tax is void, on which could not be collected against or from the person upon whom it was levied, a stranger paying the amount for the use of that person or in any way whatever ought to be able to recover his money. The difficulty arises as to the form of the complaint in each case. It is unques-
144 tionably an action for property and injury to property, and the mention about the tax and the payment of it is incidental to that, and it is carrying the doctrine of construction as to liberality allowed in pleading to a great length to say that under such form of complaint the action may be maintained for money without reference to the cause of action stated. But it is nevertheless true that it is stated in each complaint that the sum of money was exacted for releasing the stock from the levy, and in each case there is a prayer for judgment for this amount, $12,742.52, and interest. Under the present impression I have I think the action may perhaps be allowed to stand for that sum, denying to the plaintiff the right to recover for the cattle or the injury to them as matters occurring before it acquired title to the property or possession of that property. In so far as it is alleged that this company was organized with a view to maintain a suit in this court on matters which had previously arisen between the plaintiff or Mr. Haley and the defendant-, I have no doubt that the evidence establishes the fact that

the company was so organized. My understanding is that it does not defeat the suit in itself, provided that the plaintiff has a cause of action for the money which was paid to secure the possession of this property. In other words, if the jury should be satisfied that this money was paid by the plaintiff, and should also be satisfied that the tax was void and one which could not be collected, the circumstance that the company was organized with the direct purpose on the part of those organizing it to maintain a suit in this court does not defeat the action. The cases cited by counsel are cases in which the bonds and other instruments upon
145 which suit was founded were assigned by the owners of them to the plaintiff merely to bring suit upon them. By the assignment the plaintiff acquired no interest in the choses in action, and in that case, where one individual assigns to another an instrument or other cause of action with the intent that the other shall bring suit upon it and the proceeds be turned over to the assignor whenever they shall be collected, there is no question whatever of the fact that the assignment is collusive and made for the purpose of maintaining the action in the Federal court. But that is not this case, if it be assumed that this plaintiff paid the money for getting possession of these cattle, and that the money belonged to it, and that the tax was one which could not be collected.

The motion for direction to the jury will be denied for the reasons which I have stated.

To which ruling of the court the defendants by their counsel, then and there duly excepted.

Mr. JOHNSON: We now ask the court to exclude from the consideration of the jury all testimony of these expert witnesses about the keeping of and damage to these cattle.

The COURT: All that part of the case is excluded, Mr. Johnson. You have not to meet that at all.

And thereupon the defendants, to maintain the issues on their behalf, gave in evidence as follows—that is to say:

SAMUEL D. WILSON, a witness called on behalf of defendants, being first duly sworn, testified as follows:

Direct examination.

146 By H. B. JOHNSON, Esq.:

Q. Mr. Wilson, are you the present treasurer of Routt county?

A. Yes, sir.

Q. Are you the person who is alleged in these suits to have made a distraint of certain cattle?

A. Yes, sir.

Q. You may state whether or not what you did in that regard was done officially as the treasurer of said county.

A. Yes, sir; it was.

Q. I will get you to examine this paper and state what it is. (Hands paper to witness.)

A. This is a copy of the tax-roll.

Q. Well, what roll? Do you mean the assessor's roll or the treasurer's roll?

A. The treasurer's roll.

Q. You may state whether or not that is an exact copy of the treasurer's roll on file in your office at the present time.

A. It is a correct copy.

Q. And at the time of the restrain- of these cattle?

A. Yes, sir.

Mr. JOHNSON: We offer said document in evidence.

Mr. HUGHES: We object for the reason that if this is competent evidence at all it is intended to show regular process held by the treasurer, and that this roll is void on its face, for the reason that under the head "lands" description- are mentioned as "six sections of land, 960," without giving section, township, or range; that upon the face of the document it shows material alterations, interlineations; third, it shows erasures; fourth, that without the interlineations and alterations the roll is void on its face; fifth, that if this be process according to the constitution of the State it ought to run in the name of the people of the State; this does not do so; sixth, the certificate is appended: "Witness my hand and seal this 11th day of January, 1889; S. D. Wilson, treasurer of Routt
147 county, Colorado;" without the seal; seventh, there is no description of the property, either real or personal; eighth, that there are no words, numerals, or characters to indicate what the collection of figures mean; ninth, this process on its face shows that the tax claimed upon the lands is void.

The COURT: Well, we will receive all the evidence relating to the assessment-rolls and determine in the end what bearing they have. We will receive all the evidence of yours and intend to receive the defendants' evidence with respect to this.

Mr. TELLER: We will save an exception.

(Here follows table marked pages 148 and 149.)

150 Mr. JOHNSON: I will read part of this roll:

"OFFICE OF THE COUNTY CLERK AND RECORDER,
"ROUTT COUNTY, COLORADO,
"HAHN'S PEAK, *Nov.* 1, 1884.

"STATE OF COLORADO, } ss:
"*County of Routt*, }

"To the treas. of Routt county, Greeting:

"You are hereby notified and commanded to collect the foregoing taxes levied by State and county authorities for the year 1884 as required by law, and this shall be your warrant therefor.

"Witness my hand and official — this first day of November, A. D. 1884.

"C. BRANDEGEE,
"*County Clerk*,
"By I. G. VOICE, *Dept.*"

Q. Mr. Wilson, I find that under the headings "total valuation," "total taxes," "county taxes," "State taxes," "school taxes," "road taxes," and other taxes over the valuations in ink there are written some figures in pencil, giving smaller amounts in every particular than those in ink, and those pencil marks are followed by the words "as offered to Co. by commissioners." Will you state what those pencil marks indicate and what they refer to?

Mr. HUGHES: We object. The document — the best evidence of that.

The COURT: You may save your exception. The objection is overruled.

To which ruling of the court the plaintiff, by counsel, then and there duly excepted.

A. Those figures were to indicate the compromise that was offered to Mr. Haley at some time; I have forgotten the date, but it was in 1885.

Q. Well, will you stated *what* they were noted on the book there?

A. As I understand it, the county clerk was authorized to put them there and instruct the treasurer to receive that amount in case he would pay it.

Q. That amount in each case is less than the original amount of taxes?

A. Yes; there is a reduction made by the county commissioners on this tax.

Q. You may state whether or not there was any change in any of those values appearing at present upon the books on file
151 in your office other than merely putting those pencil marks over the others.

A. That and the dollar-marks have been added to it in pencil, too.

Q. Was that in pencil also?

A. I think so, if that is a correct copy.

Q. Well, the dollar-marks here are in ink.

A. My impression is that they were in pencil. Let me look at the paper again. (Examines paper.) They were in ink, then, on the original.

Q. You may state whether or not there has been any change in the treasurer's book and this roll other than the one alluded to and the insertion over these columns, "total valuation," "total taxes," &c., the dollar-mark, and then the letters "doll." and "cts."

A. There is no other change.

Q. You may state whether or not this book is now in your office, shown by this roll, in the exact condition that it was when it was turned over to you.

A. It was exactly the same; yes, sir.

Q. Has any change at all been made in that book by you or since you came into your position?

A. None whatever.

Q. You may state, Mr. Wilson, whether you were here in Denver in the month of August, 1888.

A. I was.

Q. Attending a trial?

A. Yes, sir.

Q. Or a motion to dissolve certain injunctions?

A. Yes, sir.

Q. With reference to this identical tax?

A. Yes, sir.

Q. You may state whether or not, subsequent to the termination of that case, you had any talk with Mr. Haley in regard to paying this tax here in Denver.

A. Do you mean before that case was decided—before the injunction was decided?

Q. After it was decided.

A. Yes, sir; I did, afterwards.

Q. State what that conversation was.

152 A. Well, it was in regard to the payment of the tax. He came to me and wanted to know if I would receive part of the tax in money and the other in notes of his, and I refused to receive it in that way. Then he wanted to know what sort of payment I wanted, and I told him. Then he said it was difficult to get the currency out in that country, and I told him that I would receive a certified check for it.

Q. Well, what was finally agreed on?

A. It was finally agreed that he would either bring or send a certified check to the place where the cattle were advertised to be sold.

Q. You may state whether the amount paid and receipted for by you was the true and actual amount due.

A. It was.

Q. For taxes and costs and expenses?

A. Yes, sir; it was.

Q. You may state whether or not during those negotiations for a settlement and payment of this tax after the dissolution of the injunction and while the parties were here in Denver and before the payment of the tax—whether during all those negotiations any such thing as the Haley Live Stock Company was mentioned.

A. No, sir; the first I ever heard of the Haley Live Stock Company was at a time when his foreman presented the check to me in payment of the taxes. That was the first time I ever heard of it—of the name of the Haley Live Stock Company.

Q. How long was that after your negotiations here with Mr. Haley in Denver?

A. It must have been five or six days.

Q. Your receipt is dated August 31st?

A. That was the time the receipt was dated. That was the first I heard of it.

Q. Well, what was said upon that occasion about the Haley Live Stock Company?

A. Why, the foreman, when he presented the check, said he wanted the receipt in the name of the Haley Live Stock Company—the receipt for the taxes.

Q. And that was the first time you ever heard of such a company?

A. That was the first time I ever heard of the company; yes, sir.

153 Q. You may state, Mr. Wilson, if you know, the amount of taxes out of this twelve thousand dollars that actually went into the county treasury.

Mr. HUGHES: We object.

The COURT: I think he may state that.

Mr. HUGHES: The pleadings show. I do not suppose they want to dispute that, and I suppose that is the highest evidence.

The COURT: I think he may answer it.

A. I cannot answer that exactly without figuring. If I could have that tax-roll I could tell.

Q. Does that tax-roll show?

A. It shows the actual amount of taxes, but it does not show the penalties and interest.

Q. Mr. Wilson, you may state whether or not the board of county commissioners as a board ever took any action with reference to directing or ordering you to collect this tax.

A. They did not.

Cross-examination.

By W. T. HUGHES, Esq.:

Q. You still live in Summit county, I think, Mr. Wilson?

A. Yes, sir.

Q. Mr. Breeze lived there at the same time you did?

A. Yes, sir.

Q. You became treasurer of Routt county in January, 1888, did you not?

A. In July, 1888.

Q. You were at Hahn's Peak in September, 1887?

A. I was.

Q. I believe I saw you there then.

A. I think I remember seeing you there during court—the September term of court—yes, sir.

Q. Do you recollect your attention being called to this roll at that time, Mr. Wilson?

A. Yes, sir.

Q. Do you recollect what was said at the time?

A. I do.

Q. You thought these changes did not amount to anything?

154 A. I said I did not think those changes were any injury to Mr. Haley.

Q. They were discussing those differences, were they not, in ink?

A. They were discussing the fact of the differences being there and for what purpose they were there.

Q. These are leaves, are they not, cut from the back of your book?

A. Yes, sir.

Q. Can you explain why you furnished others with leaves cut from your book and did not do it for us?

The COURT: You cannot ask that question.

Q. You collected off of the cattle seized the exact taxes mentioned in this roll, did you not, as I understand it?

A. Yes, sir; with the addition of the penalty and interest, &c.

Q. And for the lands, as I understand it, and all?

A. Yes, sir.

Q. Now, when you made this copy you put pencil marks in this where you found them in the original and ink where you found ink, did you not?

A. Yes, sir.

Q. Your office at Hahn's peak is in the county clerk and recorder's office, is it not?

A. It is not.

Q. Was it not in 1888?

A. My office was never in the county clerk's office.

Q. The county clerk and recorder, then, has not been your deputy?

A. No, sir.

Q. Do you know of some articles of incorporation of the Haley Live Stock Company having been filed in the county clerk and recorder's office of Routt county along in the spring of 1888? It may be as late as some time in June.

A. No, sir; the first time I heard of the Haley Live Stock Company was on the 21st of August, 1888.

Q. Did you never hear that it had filed articles of incorporation with the clerk and recorder of Routt county earlier than that?

A. No, sir; I do not know that they have yet. I never
155 heard of their being filed as yet.

Q. Do you know—did you have any knowledge of their applying for relief to the courts before this tax was paid—the money—by the Haley Live Stock Company?

A. No, sir.

Q. Never heard of that?

A. No, sir.

Q. Did Mr. Iles never tell you to collect this tax?

A. Why, no; he never told me to collect them. We have had some talks in regard to the matter.

Q. Did you hear his testimony in 1888 in the case on a motion to dissolve at chambers before Judge Decker? Do you remember that he was a witness?

A. I heard his testimony; yes, sir.

Q. Do you recollect that he said then that he intended the tax should be collected?

A. No, sir; I do not.
Q. You don't recollect that? Is your memory clear?

The COURT: Don't go into that; it is immaterial, Mr. Hughes.

Q. Did Mr. Thorpe ever have any conversation with you about it?

The COURT: Don't go into it; it is immaterial under the present aspect of the case what the commissioners said about it.

Q. Where was Mr. Iles when you had the cattle seized and were holding them under guard?

The COURT: You need not ask that. We have all got to the point where all of that is of no value.
Mr. HUGHES: I believe I understand your honor's view of it.

Q. In which commissioner's district was this seizure made?
A. I do not really know which district it was. My impression is that it was in Mr. Iles' district.
Q. Did Mr. Iles—was he on the ground any of the time
156 during this round-up?
A. At the time of the seizure?
Q. Yes.
A. No, sir.
Q. Was not Mr. Iles with you some of the time between the 27th of July and the 22nd of August?
A. I was going to explain to you awhile ago that I met him on his way from home up to Egeria park during the time I was holding the cattle.
Q. Mr. John Breeze was with you, was he not?
A. Yes, sir; part of the time.
Q. Did he assist as one of the employés in the round-up?
A. No, sir.

The COURT: That is immaterial. We do not care for that in the least. I do not wish you to spend any time on this matter.

Redirect examination.

By H. B. JOHNSON, Esq.:

Q. Mr. Wilson, were you here at the time of the hearing on the dissolution of that injunction?
A. I was.
Q. Did you hear Mr. Haley testify upon that occasion?
A. I did.
Q. You may state what he testified to with reference to the then ownership of those cattle.

Mr. HUGHES: We object.
The COURT: I think Mr. Haley stated himself what he testified to. I do not think that is now material. We regard the fact as established that Mr. Kinney was then recognized as the owner and possessor of these cattle.

Q. You may state whether or not Mr. Haley or Mr. Kinney were either of them up there w-ere these cattle were previous to the time you receipted for the taxes and the time he testified here and upon that hearing.

Mr. HUGHES: We object.

The COURT: You can answer that.

157 A. Mr. Kinney—I saw him during the time we held these cattle. Do you want to know whether either Kinney or Haley was there?

Q. Whether they went from here up there after they had testified in this case and after your settlement with Mr. Haley or agreement that he should pay.

A. I never heard of them there afterwards—that is, for some time afterwards.

Q. Well, were they either of them up there where the cattle were delivered, previous to the time you receipted for this tax?

A. And after the time?

Q. Yes.

A. No, sir; I did not see them.

Q. How long was it between the time you settled this matter with Mr. Haley here in Denver and the time he got up there and the delivery of the receipt or he obtained the receipt and took possession of the cattle?

A. I think it was about six days or in that neighborhood; probably somewhere from five to seven days.

Mr. JOHNSON: I offer in evidence a certified copy of the tax schedule, certified by the county clerk.

Mr. HUGHES: We object to the schedule because it is not the record. It is the memorandum out of which the record is made. A memorandum out of which a record is made is not admissible. We further object for the reason that there is no description of any lands, just "six quarter sections." We further object because it is not signed by the assessor. On its face it does not appear to have been made by the assessor. It is not signed by him. It is not an official act of his.

The COURT: It may be received.

Mr. HUGHES: The plaintiff saves an exception.

Said document is received in evidence, marked Exhibit D 4, and is as follows:

158 Ex. C.

Before making out your list read these acts to provide for the assessment and collection of revenue in Colorado.

Extracts from Laws, Approved March 20, 1877.

SECTION 1. That, for the support of the government of the State, the payment of public debt, and the advancement of public interest, taxes shall be levied as hereinafter provided.

SEC. 3. "Real estate" includes:

1. All lands within the State to which title or the right of title has been acquired from the Government of the United States.

2. All mines, minerals and quarries in and under the land, and all right and privileges appertaining thereto.

"Improvements" includes:

All buildings, structures, fixtures and fences erected upon or affixed to land, whether title has been acquired to said land or not.

"Personal property" includes:

Everything which is the subject of ownership, not included within the term "real estate."

"Credit" includes:

Every claim and demand for money, labor or other valuable thing, and every annuity or sum of money receivable at stated periods.

SEC. 4. All property, both real and personal, within the State, not expressly exempt by law, shall be subject to taxation.

By whom, where, and in what manner property shall be listed.

SEC. 7. Every inhabitant of this State, of full age and sound mind, shall list all property subject to taxation in this State, of which he is the owner or has the control or management, in the manner hereinafter directed; but the property of a ward shall be listed by his guardian; of a minor having no guardian, by his father, if living; if not, then by his mother, if living; and if not, then by the person having the property in charge; of a married woman by her husband, but if he be unable, neglects or refuses, by herself; of a beneficiary for whom property is held in trust, by the trustee.

The property of every deceased person shall be listed by the executor or administrator.

The property of persons or corporations whose assets are in the hands of receivers shall be listed by such receiver; if a body corporate, company, society or partnership, by its principal accounting officer, agent or partner; property under mortgage or lease shall be listed by and taxed to the mortgagor or lessor, unless it be listed by the mortgagee or lessee.

SEC. 8. Commission merchants and all persons trading and dealing on commission, and consignees authorized to sell when the owner of the goods does not reside in the county in which such commission merchants, persons or consignees are doing business, are, for the purpose of taxation, to be deemed the owners of the property in their possession.

159 SEC. 9. All personal property shall be listed in the county where it shall be on the first day of May of the then current year, but if the owner resides out of the State, or fails to return his property to the assessor, it shall be listed and taxed where it may then be: Provided, that horses, mules, cattle and sheep running at large and not being worked, shall in all cases be returned and assessed in the county in which they are being herded or kept on the first day of May in each year.

SEC. 14. All taxable property shall be listed and valued each year, and shall be assessed at its full cash value.

SEC. 15. In making up the amounts of credits which any person is required to list, he will be entitled to deduct from their gross amount the amount of *bona fide* debts owing by him, but no acknowledgment of indebtedness not founded on actual consideration, and no such acknowledgment made for the purpose of being so deducted shall be considered a debt within the intent of this section, and no person will be entitled to a deduction on account of an obligation of any kind given to an insurance company for the premium of insurance, or on account of an unpaid subscription to any institution or society, nor on account of a subscription to or installment payable on the capital stock of any company or incorporation, and no liability of any person or persons as surety for another shall be deducted, and no deduction shall be made in any case unless the party claiming such deduction shall disclose to the assessor, under oath, the name or names of the person or persons to whom such party is indebted, and the amount of such indebtedness to each, and also that such indebtedness is not barred by the statute of limitations.

Concerning the taxing of the shares of stockholders in national banks, banking associations, and for other purposes.

SEC. 16. Any person acting as the agent of another, or having in his possession or under his control or management any money, notes or credits, or personal property belonging to such other person, shall be required to list the same at their full cash value, and if he neglects or refuses to render the list or to swear to the same, the amount of such money, property, notes or credits shall be listed and valued according to the best judgment of the assessor.

There shall be levied and assessed by the State, county and municipal authorities in this State, upon all bank stock, or stock in any moneyed corporation of loan or discount, on each share thereof owned by any individual, body corporate, corporation or society a sum equal to but not greater in proportion to the value thereof than is levied and assessed upon other moneyed capital or personal property in the hands of or owned by individuals in this State.

SEC. 17. All shares of the banking associations organized within this State pursuant to the provisions of the acts of Congress to procure a national currency, secured by a pledge of the United States stocks, and to provide for the circulation and redemption thereof, held by any person or body corporate, shall be included in the valuation of the personal property of such person or body corporate in the assessment of taxes in the county where such banking associations are located, and not elsewhere, whether the holder thereof resides there or not, and it shall be lawful for the State, county, town and municipal authorities to levy and assess upon such stock or each share thereof, owned by any such individual, body corporate, corporation or society a sum equal to but not greater according to the value thereof than is levied and

assessed upon other moneyed capital or personal property in the hands of individual citizens in this State; provided that the tax so imposed under this act upon the value of shares of said national banks does not exceed the rate imposed upon the value of shares in any of the banks or banking associations organized under the authority of the late Territory of Colorado; provided, also, that nothing in this act shall exempt the real estate of such banking associations from either State, county or municipal taxes to the same extent according to its value as other real estate is taxed.

SEC. 18. The president, cashier or principal accounting officer of each of said associations, between the first and twentieth days of May of each year, shall list the shares of the association, giving the assessor the names of each person owning shares and the amount owned by each, for the purpose of securing the collection of taxes assessed upon said shares; each banking association shall be liable to pay the same as the agent of each of its shareholders under the provisions of section 17 of this act.

And the association shall retain so much of any dividend belonging to any shareholder as shall be necessary to pay any taxes levied upon his shares. And if neither the said president, cashier or accounting officer shall comply with the provisions of this section, the association shall be liable to pay the tax upon all the said shares, the same shall be assessed against such association by the assessor.

Of merchandise and manufacturing.

SEC. 23. * * * In listing the average amount of merchandise for the year ending May first in any year, the person so listing shall take the average value of such property in his possession, or control, during the year next previous to the time of listing, and if he has not been engaged in the business so long, then he shall take the average during such time as he may have been so engaged; and if he be commencing, he shall take the value of the property on hand at the time of listing.

Any person who purchases, receives or holds personal property of any description for the purpose of adding to the value thereof by any process of manufacturing, refining, purifying, or by the combination of different materials, with a view of making gain or profit by so doing, and by selling the same, shall be held to be a manufacturer for the purposes of this act, and he shall list for taxation the average value of such property in his hands, estimated as merchants are directed by this section: but the value shall be estimated upon the materials only entering into the combination or manufacture.

Owners or agents refusing to list, the assessor shall list.

SEC. 27. If any person, who is known to the assessor to be liable to give in a list and pay taxes agreeably to the provisions of this act, shall neglect or refuse to give in his list, made and sworn to as hereinbefore prescribed, on or before the twentieth day of May in each year, the assessor shall fill out a list for such person, putting

therein all taxable property which he has reason to believe is owned by said person liable to taxation, at its present full cash value.

Concealment and evasion.

161 SEC. 28. Any property wilfully concealed, removed, transferred or misrepresented by the owner or agent thereof to evade taxation, upon discovery shall be assessed by the assessor at its true cash value. And the owner thereof shall be deemed guilty of a misde-anor, and, upon conviction, shall be fined in any sum not less than five nor more than one hundred dollars. And the assessor or treasurer shall examine, under oath, any person or persons who he has reason to believe possesses any knowledge of such wilful concealment, removal, transferment or misrepresentation.

Penalty.

SEC. 30. If any person, with whom the assessor shall have left a notice requiring him to make out a list of property for taxation, shall have no property which by this act he is required to list, either on his own account or on behalf of others, he shall set forth such fact on the blanks left with him by the assessor, or otherwise, and shall make oath or affirmation to the truth thereof, and return the same to the assessor on or before the twentieth day of May, and every person owning or having charge of property subject to taxation, and required by this act to list the same, shall fail, neglect or refuse to do so as herein required, or who shall return a list known to be erroneous or defective, either as to the description of real estate, number, value or amount of personal property, or who shall wilfully make, or fail to make, in such list, any statement whatever, whereby he shall avoid any assessment of taxes, proper to be made against him, shall be subject to a penalty of not less than one hundred dollars nor more than one thousand dollars, to be recovered by the county commissioners for the use of the county, in any court of competent jurisdiction: and it shall be the duty of any assessor or treasurer having knowledge of a violation of the provisions of this section to report the same to the district attorney.

SEC. 38. The county commissioners of each county in this State shall constitute a board of equalization for the correction and completion of the assessment-rolls for their respective counties. Said board shall hold two regular meetings in each year, at the office of the county clerk, at the county-seat, as follows, viz: Commencing on the first Monday in July, and continuing not less than three nor more than ten consecutive days; and on the third Monday of July, and continuing not less than one or more than three consecutive days. Said board shall, at its first meeting, have power to supply omissions in the assessment-roll, and for the purpose of equalizing the same may increase, diminish or otherwise alter and correct any assessment or valuation. In case any material changes are made by said board in the assessment of any person or persons at said first meeting, the county clerk shall, at the close of said meeting, notify said person or persons by letter or otherwise that such change

has been made. Said board shall, at its second meeting, sit to hear complaints from those aggrieved by said changes, or otherwise, and shall have power to so adjust said assessment-roll as in their judgment is proper and right.

Miscellaneous.

SEC. 104. As between grantor and grantee of any land where there is no express agreement as to which shall pay the taxes that may be assessed thereon, if such land is conveyed between the first day of January and the first day of May, then the grantee shall pay the same; but if conveyed between the first day of May and the first day of January, the grantor shall pay them.

162 SEC. 105. Lands entered by pre-emption, final homestead, at public or private sale, or otherwise, shall be subject to taxation, whether the patent for the same shall have been issued or not, and, when such entry shall be made before the first day of May in any year, the land so entered shall be subject to taxation for that year.

Tree act, approved February 12, 1881.

SEC. 2. That whenever a line of forest trees, not less than sixteen feet apart, shall hereafter be planted at not more than eight feet from the outer line of a highway upon which his land may border, or along ditches within his land, and kept in good growing condition for three (3) years, there shall be paid as a premium to such owner of the said land, on the fourth year, and for the next six years following, the sum of two dollars for every one hundred trees so planted, provided that said trees be so long kept in good growing condition.

Tax Schedule of Real and Personal Property Owned or Held by Ora Haley, of Routt County, Colorado, on the 1st of May, 1884.

Description of lands.

No. of school district.	Part of section.	Section.	Town.	Range.	No. of acres.
	Six ¼ sections				960

Price per acre.	Valuation.		Improvements on public lands.	Total.
	Lands.	Improvements.		
Dollars. 3 50	*Dollars.* 2,880	*Dollars.* 900	*Dollars.* 800	*Dollars.*

City and Town Property in—

No. of school district.	Lots.	Block.	Division or addition.	Valuation.		Total.
				Lots.	Improvements.	
				Dollars.	*Dollars.*	*Dollars.*

163 *Personal Property.*

Number.	Description.	Valuation.
	Horses—American.	*Dollars.*
1	Stallions, all ages	200
	One year old and under	
	Two years old	
	Three years old	
	Four yrs. old and over, broke and brood mares	
	Half-breeds.	
11	One year old and under, 15	165
	Two years old	
	Three years old	
36	Four yrs. old and over, broke and brood mares, 55	1,800
	Ponies and bronchos.	
	One year old and under	
	Two years old	
	Three years old	
117	Four yrs. old and over, broke and brood mares, 40	4,680
165	Total dollars	6,845
	Mules.	
	One year old and under	
	Two years old	
2	Three years old and over and broke, 50	100
	Total dollars	100

Number.	Description.	Valuation.
	Cattle—American.	*Dollars.*
200	Bulls, 40	8,000
2,000	One year old and under, 10	20,000
2,000	Two years old, 15	30,000
3,000	Three years old, and cows, 25	75,000
1,000	Four years old (beef steers), 30	30,000
	Half-breeds.	
	One year old and under	
	Two years old	
	Three years old, and cows	
	Four years old (beef steers), $198.70	
	Texas.	
	One year old and under	
	Two years old	
	Three years old, and cows	
	Four years old (beef steers)	
8,200	Total dollars	163,000
8,200	Head of cattle	
	Sheep.	
	American	
	Half-breeds	
	Mexican	
	Total dollars	
	Swine	
164	All other animals	
	Clocks and watches	
	Musical instruments	
3	Carriages and other vehicles of all kinds	200
	Amount of capital employed in manufacture	
	Total dollars	

Description.		Valuation.
		Dollars.
Average value of merchandise		200
Stocks or shares in any corporation or company		
Household furniture, over $200		
Jewelry and gold and silver plate		
Net output of mines		
All other property not enumerated above		175
Polls		
Military polls		
	School district.	
Recapitulation.		
Lands		2,880
Improvements		900
Improvements on public lands		800
Lots		
Improvements		
Mines		
Horses		6,845
Mules		100
Cattle		163,000
Sheep		
Swine		
All other animals		
Clocks and watches		
Musical instruments		
Carriages and other vehicles of all kinds		200
Moneys and credits		
Capital in manufacture		
Capital in merchandise		200
Stocks or shares		
Household furniture		
Jewelry, gold and silver plate		
Net output of mines		
All other property		175
Grand total in dollars		175,000

165 STATE OF COLORADO, } ss:
Routt County, }

I, —— ——, do solemnly swear or affirm that according to the best of my knowledge and belief the above list contains a full and correct statement of all property subject to taxation which I or any firm of which I am a member, or any corporation, association, or company of which I am president, cashier, secretary, or managing agent, own, possess, or control in Routt county and which is not already assessed.

By the assessor: —— ——.

Sworn to and subscribed before me this — day of ——, A. D. 1887.

—— ——, *Assessor.*

D. 4 —, No. —, May 1, 1884.

Tax Schedule of Real and Personal Property of Ora Haley.

LARIMY, ROUTT COUNTY, COLORADO.

Take notice that in pursuance of the statutes of Colorado you are required to make out a return in accordance with law of all your taxable property in this county and deliver the same to me at my office or such place as may hereafter be designated in your election precinct, or the same will be assessed against you by the assessor with the penalty as provided by law.

No return can be received unless signed and sworn to.

——,
Assessor, Routt County.

Preserve this schedule.

Return this to me at ——, on ——, 1884.

—— ——, *Assessor.*

STATE OF COLORADO, } ss:
County of Routt, }

I, Isaac G. Voice, county clerk and recorder of Routt county, Colorado, do hereby certify that the within schedule is a correct and true copy of the original schedule of the assessment of Ora Haley's property in Routt Co., Colo., for the year 1884, as returned by the assessor of said county and now on file in my office.

Witness my hand and the seal of said county, at Hahn's Peak, Colorado, this 6th day of October, A. D. 1887.

[SEAL.] I. G. VOICE,
County Clerk.

166 Mr. JOHNSON: I now offer in evidence two letters written by Mr. Haley to the board of county commissioners, one dated October 3rd, 1884, and the other June 27th, 1884.

Mr. HUGHES: We object to the letter dated June 27th, 1884, for the reason that at most this could be offered for the purpose of *estoppel in pais* as against the record; that some correspondence between

Mr. Haley and the board of county commissioners of Routt county, in June, 1884, before the assessment was made, or attempted assessment was made, could in nowise supply an assessment or a record; that the letters in themselves are wholly immaterial, and if they were a record proper would go to show no fact to prove any issue in this case. As to the letter of October 3, 1884, we make the same objections.

Mr. TELLER: It is an unsworn statement of Mr. Haley and cannot be received as evidence against this plaintiff.

The COURT: They may be admitted.

Said letters are accordingly admitted in evidence, are marked Exhibits 5 and 6 respectively, and are as follows:

Ex. P 5.

LARAMIE CITY, WYOMING, *June* 27, 1884.

To the honorable board of county commissioners of Routt Co., Colo.

DEAR SIRS: As I have not listed my Routt County property for taxation for the year 1884 I consider it quite necessary for me to make an explanation and statement. I have not been to my Lay Creek ranch since the last of April; neither have I heard anything from the assessor regarding it, and there has been no one at my ranch competent to list my property, my foreman being a new man there. There has been no blanks sent me here and I have been unable to find any at this place or at Rawlins of the Colorado form, so under the circumstances all I can do at this late date is to make this statement, which I trust will take precedence over any circulated report from any prejudiced persons regarding my Routt County property.

In addition to my property of 1883 I have three additional one-fourth sections of four hundred and eighty acres.

Improvements on same, $150 each	$450
I have eleven yearling colts, $25 each	275
I have sixteen hundred head more cattle, at $10	48,000
Additional improvements on public lands	200
	$48,925

167 Trusting this, in addition to my assessment of 1883, may be satisfactory, I remain most respectfully,

ORA HALEY.

Ex. P 6.

RAWLINS, WYO., *October* 3, 1884.

To the hon. board of county commissioners of Routt county.

DEAR SIRS: Below please find sworn statement of my Routt County property as should have been listed for taxation on May 1, 1884, which I trust will receive your just consideration. I have

land proofs for six hundred and forty acres only, which cost about $3 per acre, improvements on same not to exceed $650; improvements on school and other public lands, $500. I was the owner of one hundred and forty-one horses only in the county, not worth more than $35 per head, and three mules. I did not have to exceed six thousand three hundred head of cattle in the county; wagons and farming implements, $300. Trust you will adjust this before the levy.

Very respectfully, ORA HALEY.

Subscribed and sworn to before me this 3d day of October, A. D. 1884.

A. G. EDGERTON, *J. P.*

To which ruling of the court the plaintiff, by counsel, then and there duly excepted.

Mr. JOHNSON: I offer in evidence a letter dated December 30th, 1884.

Mr. HUGHES: We object because this letter refers to other things. Those things referred to are necessarily incorporated in it. The letter, as a fragment of what is going in, is not admissible. By reading the letter we find that he said he was ready to pay taxes according to this sworn statement furnished in June, 1884. He writes to the county treasurer of Routt on December 30, 1884, that he is ready to pay taxes if they will accept them, as taxes on his sworn statement furnished the assessor, and unless they show what that sworn statement was it would not cut any figure. It was an offer to compromise, and offers of compromise are never admissible. So that, unless they offer the things referred to here, this will make no weight in the case nor can it then, as matters of *estoppel*
168 *in pais* can never supply the dignity and importance of a record. It is also immaterial to the issue here.

The court overruled said objection and admitted said paper in evidence.

To which ruling of the court the plaintiff, by counsel, then and there duly excepted.

Said letter so admitted is marked Exhibit D 7 and is as follows:

Mr. JOHNSON: I have a record here in the case that went to the supreme court, in which this whole matter was litigated, and I want to offer the schedule of 1883, of Mr. Haley's tax, which he refers to in those letters. I offer that more particularly to show that the description of the land upon which he was assessed and paid his taxes in 1883 was used as generally as that contained in this. That is to lay a basis for the legal proposition—that we can show plenty of authority for—that if he returns his property with a general description that he cannot afterwards complain that the description was not sufficient. This was the description of 1884——

The COURT: We will not receive that.

169 To which ruling of the court the defendants, by their counsel, then and there duly excepted.

The COURT: I will receive anything you have about the assessment of 1884 only.

Mr. JOHNSON: I offer in this connection this record as a whole to show that upon these several rolls and upon these several assessments the supreme court——

The COURT: You have not plead a former adjudication.

Mr. JOHNSON: I do not offer it as a former adjudication. I never claimed a former adjudication, so far as this plaintiff is concerned. He was not a party. The Haley Live Stock Company was not a party to this litigation. We attempted to plead it in a general way upon the theory that this is substantially the same party. We could not make the technical plea of *res adjudicata* upon that view; but we offer it for this purpose to show——

The COURT: You could have made a very different plea from what you did.

Mr. JOHNSON: We do not offer this to support any plea now or upon that theory now. We merely offer it to show the authority, so far as the decision of the supreme court can go, directing Mr. Wilson to collect this tax; the construction of this roll and the finding upon these other papers that are now going before this jury that it was the duty of the treasurer to go on and collect the tax; to show that he virtually collected the tax under the direction of the supreme court of the State and upon these very rolls.

The COURT: The Haley Live Stock Company is in the shoes of Mr. Haley and they cannot recover unless he could.

170 Mr. JOHNSON: We think the certificate establishes the fact of Mr. Wilson's liability, not only against him personally, but against the county also. It is well settled that, if an officer under the warrant that is regular on its face collects the tax, *that* he is not liable. Now they say, possibly, that there were certain irregularities in this warrant, and, while those irregularities do not appear upon the face of the warrant, he had antecedent knowledge of them. Now, if we show that after their knowledge this very document was before the supreme court and the supreme court adjudicated that it was his duty to collect the taxes, then that certainly goes to the question of his personal liability.

Mr. TELLER: We object to it as immaterial and irrelevant under the evidence.

The COURT: We shall be glad, then, to dismiss it.

Mr. HUGHES: We object to it for this reason: That upon its face it shows there never was a final hearing in any court upon the merits of the case; that the only hearing ever had was before a judge at chambers on a motion for the dissolution of an injunction, upon which an appeal was taken to the supreme court, and the case was ordered dismissed on that hearing. If it had been pleaded it could not be admitted, because on its face——

Mr. JOHNSON: One other ground I offer it on is this: I offer the pleadings in this case to show that there never was any doubt or

uncertainty in the mind of Mr. Haley in regard to the amount of taxes that were assessed. The only complaint that can be made against this roll is perhaps the description of the land and
171 the figures establishing the valuation, &c., being disconnected with any marks or words originally to indicate that theory, but before this roll was changed or amended at all or they corrected these clerical errors they brought these suits, and they allege the exact amount of taxes that was assessed, showing that they knew perfectly well that these figures meant dollars and what they meant and what amount they meant. We offer to show by these records that Mr. Haley, in the early stage of this litigation, set forth in his complaint the description of this assessment and these taxes, alleging the amount in dollars and cents that was claimed by the county precisely as they are claimed.

The COURT: They will not be received.

To which ruling of the court the defendants, by their counsel, then and there duly excepted.

T. H. ILES, a witness produced on behalf of the defendant, being first duly sworn, testified as follows:

Direct examination.

By H. B. JOHNSON, Esq.:

Q. Where do you reside, Mr. Iles?

A. In Routt county, Colorado.

Q. You may state whether or not you were a member of the board of county commissioners of that county.

A. I was, but I am not now.

Q. Were you in 1888?

A. I was.

Q. You may state whether or not you were present in Denver at a hearing on a motion to dissolve an injunction, in August, 1888.

A. I was.

Q. Do you remember the date of that decision?

A. Simply as my mind has been brought to it since. I do not remember it from the date showing the record of it.

172 Q. Well, fix the date as near as you can.

A. It was the 15th day of June. The decision of the supreme court I understand you refer to.

Q. No; I do not refer to that, but, since you have mentioned it, I will ask if the last decision of the supreme court was of that date that you state.

A. Yes; it was the 15th day of June, if my memory serves me right.

Q. You may state whether upon the hearing of the motion to dissolve the injunction in the State courts here in August you saw the bill of sale from Mr. Haley to Mr. Kinney that was introduced in that case.

A. I did; yes, sir.

Q. You may state what date that was.

A. That was the 15th day of June.

Q. The same date as the last decision of the supreme court?

A. The same date as the last decision of the supreme court; yes, sir.

Q. Now, do you remember the date of the decision here in August?

A. I think it was the 16th of August. It was about the middle of August. I think it was the 16th.

Q. Now, will you state whether this bill of sale from Haley to Kinney was introduced at that time?

A. It was; yes, sir.

Q. Do you remember whether Judge Decker gave his decision promptly after the trial or took it under advisement?

Mr. HUGHES: We object.

Mr. JOHNSON: I want to show that no time elapsed between the trial and the decision.

The court overruled said objection.

A. He gave it promptly.

Q. You may state whether or not there was any endorsement or transfer of that bill of sale from Kinney over to any Haley
173 Live Stock Company.

A. There was not. I never heard of the Haley Live Stock Company at that time.

Q. Did you have any negotiations with Mr. Haley after that decision and before going home with reference to payment of this tax?

A. I did.

Q. State what they were.

A. Mr. Haley and Mr. Kinney called Mr. Wilson and myself into a private parlor in the hotel and offered to pay the taxes this way: Mr. Haley was the spokesman. He says, "Now, if Mr. Kinney will give his note for this amount I will endorse the note; and I want to know if you will accept that." My answer was that I had nothing to do with it; that Mr. Wilson was the treasurer, and if he saw fit to do that that was his business and not mine; but he asked me if I would endeavor to induce or persuade Mr. Wilson to do that, and I told him I certainly would not.

Q. Was there any talk about the Haley Live Stock Company giving any obligations?

A. The Haley Live Stock Company was never mentioned in my hearing.

Q. Had you at that time ever heard of any such company?

A. I never had.

Q. You may state how after this it was finally agreed the tax should be settled.

A. I do not know how it was finally agreed.

Q. You were not a party to the final arrangement of receiving a certified check?

A. No, sir.

Q. Did you have personally anything to do with the making of this restraint of the cattle?
A. Nothing whatever.

Cross-examination waived.

LEWIS H. BREEZE, a witness called on behalf of the defendant, being first duly sworn, testified as follows:

Direct examination.

By H. B. JOHNSON, Esq.:

174 Q. Where do you reside, Mr. Breeze?
A. In Salt Lake City.
Q. How long have you lived out there?
A. I have been there since the 8th of November last.
Q. Did you formerly reside in Routt county?
A. Yes, sir.
Q. What position, if any, did you hold there?
A. While I was in Routt county?
Q. Yes.
A. I was treasurer of Routt county from January, 1884, until July, 1888, I think it was.
Q. Are you the predecessor of Mr. Wilson?
A. I am.
Q. Were you in office at the time these amendments of this treasurer's roll were made?
A. I was.
Q. You are familiar with this paper, are you (Ex. D 3)?
A. Yes, sir; it looks like the same.
Q. You may state what these pencil marks over these columns where there are figures indicating values, &c.—what those pencil marks mean.

Mr. HUGHES: We object. The documents are the best evidence.

The court overruled said objection; to which ruling of the court the plaintiff, by counsel, then and there duly excepted.

A. Why, at the April meeting, in 1885, of the board of commissioners they made an order that they would make Mr. Haley a proposition to reduce his assessment from the other amount, as indicated in ink, and instructed the clerk to make a minute of it right there what it would be—reducing his tax—I think; it was about seven thousand head of cattle, I think, and that was what it was intended to show in case Mr. Haley accepted their proposition for a compromise.
Q. Well, who put these marks on there?
A. The county clerk, Mr. Voice.
175 Q. What do those words mean, "as offered to Co. by commissioners"? Does that refer to the compromise?
A. Yes, sir; that refers to the compromise.

Q. You may state whether or not you received instructions according to these pencil marks to settle with Mr. Haley.

A. I did.

Q. The pencil figures would make the aggregate tax $3,776.89, whereas the original assessment was $4,248.59.

A. Yes, sir; I think that the commissioners, though, were going to require Mr. Haley to give some proof that he had been overassessed before they instructed, but shortly after that he brought the injunction against me and the commissioners then rescinded this order of compromise. They got it done at the July meeting following.

Q. Do you know how this dollar-mark and the letters "dolls." in the columns of valuation of the amounts of improvements and over "total valuation" in the other columns—do you know how they came in there?

A. Yes, sir.

Q. How?

A. I put them there.

Q. When?

A. I think it was some time along in July, 1887, if I remember correctly.

Q. You may state whether they were put in there or whether you claimed to put them there by virtue of the statute read from yesterday.

A. I did.

Mr. HUGHES: We object.

The COURT: He can ask that.

Q. You may state whether you were advised that that was your duty.

A. I was.

Q. By whom?

A. By different parties.

Q. State who—by the county attorney?

A. By the county attorney; yes, sir.

Q. Who was he?

A. J. M. Breeze.

176 Q. The brother of yourself?

A. Yes, sir.

Q. Any other attorneys?

A. Yes, sir; T. M. Robinson, of Fort Collins, also told me that I had a perfect right to correct that under the statute, and to put that in.

Q. You may state whether or not Mr. Haley at any time ever pretended to be in doubt as to the amount of the taxes that were due.

Mr. HUGHES: We object.

The court sustained said objection.

Q. Mr. Breeze, you may state whether or not at the time of this assessment these six one-quarter sections of lands, aggregating nine

hundred and sixty acres, were recorded—whether there could be any record found filed in the records.

Mr. HUGHES: We object to that because immaterial.

The COURT: You cannot ask that, sir.

Q. I understand, Mr. Breeze, this is the original warrant or certified copy of the original warrant?

A. Yes, sir; I think it is.

Q. That came into your hands originally directing you to collect this tax?

A. Yes, sir.

Q. In other words, the date of this warrant, November 1st, 1884, you were the treasurer?

A. Yes, sir.

Q. Now, you may state whether there has been any erasures or changes on this warrant at all from the time that it originally came into your hands, with the exception of those pencil marks and the putting of the dollar-mark after those columns.

A. I suppose not; not to my knowledge.

Q. Were you there at the time of the distraint?

A. The last distraint?

Q. Yes.

A. Yes, sir.

Q. Was John M. Breeze there?

A. No, sir.

Q. Was L. H. Breeze there?

A. No, sir.

177 Q. Was Mr. Isles there?

A. No, sir.

Q. Or Mr. Thorpe?

A. No, sir.

Cross-examination.

By W. T. HUGHES, Esq.:

Q. Was there ever more than one alteration of that record, Mr. Breeze?

A. More than one?

Q. Yes.

A. There was not any more than one, that I know of.

Q. The only alteration, then, was that made in July, 1887?

A. Well, I may explain that by saying that it was done at two different times.

Q. When did you begin to make the first change?

A. It was in July that I made the change on this page that has been spoken of.

Q. Was that before you was spoken to, or afterwards?

A. It was after.

Q. Then, both of these changes were after the Fort Collins hearing, were they not?

A. Yes, sir.

Q. Do you recollect at Fort Collins introducing a certified copy of the roll?

A. I do.

Q. Was that a true copy of the roll as it then existed?

A. I think that there were some errors in it, because I had taken that from the tax-list that my deputy had sent me from the record.

Q. And yet you certified it was a true copy of it?

A. Yes, sir; I did.

Q. Then you think there may have been mistakes in that?

A. There might have been. This was a pocket list of the book that I had, that I carried with me in my pocket when I was traveling over the country, as I did a good deal; I could not carry the original book around with me in that country very well, and I collected a good deal of the tax in that way and my deputy made me the pocket copy, and I think that it did not correspond exactly with the roll, but I did not know it at the time.

178 Q. Well, you had a copy at a hearing before Judge Carpenter, at chambers, in February, 1887, in Golden?

A. Yes, sir.

Q. Was that a true copy of it at the time?

A. I think, if I remember that correctly, it was taken from the same pocket copy.

Q. Then the copy you introduced at Fort Collins and that copy must have been alike, were they not?

A. They ought to have been, if I took them—if I am correct in my statement that I took them from my list. That is my recollection of it.

Q. You added the dollar-marks, &c., in July, 1887?

A. A part of them.

Q. When did you add the rest?

A. It was some time in the latter—on later in the fall. I think it was about October.

Q. Look at that document and see if you recognize that as a true copy of the copy which you introduced at Golden in February, 1887. (Hands Ex. P 6.)

A. I do not remember whether it is or not.

Q. You say you made that from a pocket record you had. Now, you say that you made this one from the same record. Look at this one (Ex. P 7).

A. I do not know. The amount is the same.

Q. Do you call that the same as the copy you introduced at Golden?

A. I do not know—that is, I have not compared them to see if it is.

Q. You say that you took them from the same pocket memorandum or record?

A. Yes; I said I thought I had taken these two. I did not swear positively that I did. That is my recollection, though, that I did.

Q. You do not claim that those copies are alike, do you?

A. I do not.

Q. Can you explain, if you took these from the same record, why the name of the tax-payer is in this one and is not in this one?

A. No, sir; I cannot explain that.

179 Q. What is the first item? Can you explain the second item? In this copy it is 175.20. What is it in that (Ex. 6)? Can you explain why in this one it is 175,100? Can you explain the difference?

A. No, sir.

Q. Then the two first items you cannot explain?

A. ——.

The COURT: What was the extent of the first alteration? What was done by the first addition and the second? I want to understand. The first was done in July. How much?

Mr. HUGHES: It was the interlineation of the words "dolls." and "cts."

The COURT: How much was altered at that time?

Mr. HUGHES: I will ask the witness.

Q. Mr. Breeze, have I got the right impression of your theory of it as to the two alterations and as to what was done the first time?

A. On the page there the dollar-mark was put in across the page, and I did not have time to go ahead and complete the book, and I told my deputy to complete it and put the dollar-sign at the head of the columns there, but he did not do it, and I finished it up when I went back to the Peak. That is my impression.

(The COURT:)

Q. Was this done on the one page the first time?

A. Yes, sir.

(The COURT:)

Q. And then in October you went there and changed the whole book?

A. Yes, sir. I did not have time when I changed this first page.

(The COURT:)

Q. And in July you only changed one page?

A. That is all I had time to attend to, and instructed my deputy to go ahead and complete the book, but he failed to do it, and I finished it afterwards.

(The COURT:)

Q. You instructed him to go on and finish up the

180 entire book and do it, and he did not do it, and then you went on in October and finished it?

A. Yes, sir.

Q. Who was your deputy, Mr. Voice?

A. Yes, sir.

Q. If I understand you right, you changed the page where the tax-payers' names commence with "H" first?

A. I do not remember.

Q. Did you not just state that? Is not that a fact?
A. I cannot tell you.
Q. Was not that a fact in September, 1887?
A. There was not a page changed in that book, save where the tax-payers commence with "H," at the time of the court in September, 1887. *A.* I think I changed the balance of the book after September.
Q. That is, do you think that at the term held in September, 1887, the tax-payers whose names commence with "H" were then changed?
A. Yes, sir.
Q. Was not that the only page that was then changed?
A. I think so.
Q. And afterwards you changed the rest?
A. Yes, sir.
Q. Why did you begin at "H"?
A. Because I wanted to take a copy of that page with me to Aspen in regard to dissolving the injunction before Judge Rucker.
Q. Well, you did take a copy of that to Aspen?
A. Yes, sir.
Q. You certified it was a true copy of your records, did you not?
A. I think so.

JOHN M. BREEZE, a witness called on behalf of the defendant, being first duly sworn, testified as follows:

Direct examination.

By H. B. JOHNSON, Esq.:

Q. Mr. Breeze, where do you reside?
A. I reside here in Denver now. I formerly resided in Routt county.
Q. You may state what office, if any, you held over there.
A. I was county attorney over there for several years.
181 Q. When?
A. During the year 1888 I was county attorney there.
Q. Are you familiar with the treasurer's books over there?
A. I have examined them pretty closely during this litigation over this tax.
Q. You may state whether or not those tax books were originally printed without anything under the head of "valuations" by way of dollar-mark or anything to indicate what the figures which appeared in those columns meant.
A. There was nothing in the book as originally printed to indicate what those columns were for, except the word "value" there; nothing to indicate dollars and cents, originally.
Q. You may state what advice, if any, you subsequently gave with reference to the authority in the treasurer to amend his books and to insert those matters that were left out when they were printed.
A. When the litigation first commenced Mr. Haley's attorneys raised the question, in the case that went to the supreme court first,

that the dollar-mark, being omitted from this list, rendered the tax void. After the decision of the supreme court, holding that even without that the books were valid, I then instructed the treasurer that I thought, under the section of the statute which was read here, that it was his duty to supply that omission; that it was clearly a clerical error in not placing it there. Upon examination of the original schedule it showed that the dollars were printed out in full preceding each of the heads, and I instructed him to place those dollar and cent marks at the heads of these columns.

Q. As to the entire book?

A. It applied to the entire assessment of 1884, and it was in the same condition. The question had never been raised except by the Haley people, and I caused him to put those dollar-marks in
182 there before the second injunction suit was brought, and after, as I believed, the Haley litigation had been determined by the supreme court.

Q. Have you had occasion to examine the original roll?

A. Yes, sir.

Q. The original roll on file there before there were any changes made?

A. Yes, sir.

Q. State whether there has ever been any changes in the original roll except the one indicated in this copy of it, the dollar-mark at the head of the columns and these pencil figures over the values.

A. Never has been any other change as I can see.

Q. State whether or not these pencil figures written over these values in ink in the original roll were not made in view of erasing them in case this settlement did not go through.

A. Put there by order of the county commissioners, with an offer to compromise, which was rejected by Mr. Haley, and they rescinded their offer of compromise afterwards.

Q. Who put those pencil marks there?

A. Mr. Voice, as I understand it.

Q. What were they put there for?

A. Put there to enable the treasurer to settle with Mr. Haley according to this offer that had been made, provided he accepted.

Q. Was that offer ever accepted?

A. It was never accepted, and the offer was rescinded by the board of county commissioners. I wrote the resolution that they passed rescinding that first resolution. I was present at the time.

Q. You may state whether or not you were here in the month of August, 1888, attending a trial of a motion to dissolve a certain injunction.

A. I was.

Q. In the case of Kinney against The Board of County Commissioners?

A. Yes, sir; against the treasurer and the board.

Q. You may state whether or not you were a party to any
183 arrangement by which those taxes were to be paid after the dissolution of that injunction.

A. I was not present, Mr. Johnson, at any conversation Mr. Wilson had with anybody with reference to that.

Q. You may state whether or not you saw the bill of sale from Mr. Haley to Mr. Kinney that was introduced in evidence upon that occasion as touching the title of Mr. Kinney.

A. I do.

Q. You may state whether there was any endorsement or transfer on it to the Haley Live Stock Company.

A. Nothing of the kind about it.

Q. State whether or not at any time during that trial you ever heard of any such company.

A. I never heard of the Haley Live Stock Company until at the time of the drawing of this receipt which Mr. Wilson gave for the taxes when collected on the 21st of August. I was out at the time when Mr. Wilson sent a cowboy after me to come and draw the receipt. He said they were there to pay the taxes. I went, and when I arrived at the cabin where they were Mr. Wilson asked me to write the receipt. I commenced to do it, and while I was writing it I believe Mr. Rankin, as I believe he testified, asked me to have the receipt made out in the name of the Haley Live Stock Company. Mr. Wilson told him that we had never heard of any such company and that we would draw the receipt to the party paying the taxes.

Q. You may state — or not on the trial of that motion to dissolve there was introduced in evidence for Mr. Haley and Mr. Kinney three notes from Kinney to Mr. Haley.

Mr. HUGHES: We object.

The COURT: I do not see as that is material; that has been testified to before.

Mr. JOHNSON: Mr. Haley was in doubt about the amount, &c. I want to follow it up by showing that Mr. Kinney and Mr.
184 Haley both testified on that occasion that these notes were taken in good faith by Mr. Haley, and that it was the intention that they should be paid, Mr. Kinney swearing that he was able to pay them; that it was a *bona fide* transaction and he intended to pay them. It tends to establish that at — time there was no Haley Live Stock Company.

The COURT: We have already reached the conclusion that the Haley Live Stock Company did not own the cattle. The question is whether the Haley Live Stock Company paid the money for those taxes. The objection is overruled.

Q. You may state whether or not this herd of cattle was the same herd of cattle that was there in the year 1884, at the time this tax was levied.

—. They were gathered from the same herd of cattle that was there, and I think, as Mr. Haley testified, that these steers were mostly four or five years old; that they must have been assessed in 1884. From my observation I think they were the same cattle.

Cross-examination.

By W. T. HUGHES, Esq.:

Q. Mr. Breeze, in the beginning of your testimony you stated that the supreme court held that the assessment-roll might be made sufficient or was proper as corrected, and so on, and for that reason you ordered it finished.

A. No; I do not think I stated that.

Q. I understood you to say that Mr. Haley had raised the question that the omission of the dollar-mark——

A. In that first suit? Yes, sir.

Q. Well, you recollect that that was a fact, do you?

A. Yes, sir.

Q. Can you explain, when a roll was offered here, admitting that fact that the roll was sufficient, that it was denied as sufficient
185 because of the omission of a dollar-mark? Can you explain that?

A. I do not understand your question.

Q. It was said by counsel this morning that they offered the roll to show that Mr. Haley offered no objection to the insufficiency of the assessment-roll.

THE COURT: That is no matter. Don't spend any time on that.

A. I can explain what I said about that.

Q. When did you first learn of the Haley Live Stock Company?

A. I never heard of it, Mr. Hughes, until, as I said before, Mr. Wankin delivered the check for the taxes, on the 21st of August, 1888.

Q. Don't you know that weeks before that they filed articles of incorporation in Routt county?

A. I do not.

Q. Did you never know of their asking any relief in the courts under that name before that money was paid?

A. I have never heard of their asking relief in the courts, excepting in these cases, up to the present time.

Q. At the time the money was paid a receipt was requested, was it not, in the name of the Haley Live Stock Company?

A. Yes, sir; Mr. Rankin made that request when he delivered the check there, on the 21st of August.

Q. Why did you not give a receipt that way?

A. Neither Mr. Wilson nor I had any dealings with any such company and did not know any such company, and we did not understand it at that time why the request was made. He did not explain anything.

Q. You wrote that receipt?

A. Yes, sir; I wrote that receipt.

Q. That money was paid under protest, as stated in the receipt?

A. I so regarded it. Mr. Rankin asked to have it written that way, and I did so, to give him the full benefit of it.

186 Q. Do you know whether that fact was denied in the pleadings in this case?

The COURT: That will do, Mr. Hughes.

(Recess until 2 o'clock.)

LEWIS M. BREEZE, recalled on behalf of defendant, testified as follows:

Direct examination.

By H. B. JOHNSON, Esq.:

Q. I will ask you if you *if you* wrote this paper, Exhibit P 4, which I have read to you.
A. I did.
Q. Did you have the check before you at the time you wrote it?
A. Yes, sir.
Q. By whom was the check drawn?
A. The check was drawn by Frank X. Aicher.
Q. Payable to the order of whom?
A. Ora Haley, on the German National bank.
Q. By whom was it endorsed?
A. Endorsed on the back by Ora Haley to the order of S. D. Wilson, county treasurer.
Q. Was that name, the Haley Live Stock Company, upon that check in any shape?
A. It did not appear upon it.

Defendant rests.

And thereupon the plaintiff, to further maintain the issues on its behalf, gave in evidence in rebuttal as follows:

Mr. HUGHES: I wish to offer in evidence a complaint filed in this court on August 17th, 1888, by The Haley Live Stock Company against Samuel D. Wilson *et al.*, asking for a remedy in con-
187 nection with the matter in hand, to show what relation on the 17th of August the Haley Live Stock Company bore to this live stock on that date.
Mr. JOHNSON: This is the first time we ever heard of any such suit. We object, because it is incompetent.
The COURT: I do not think we can receive that, sir. It will be excluded.

To which ruling of the court the plaintiff, by counsel, then and there duly excepted.

Mr. HUGHES: We offer it as against many of the circumstances brought out here to show that the formation of the company and the transfer to it was an afterthought.
The COURT: You can make the offer. We do not think it is competent to receive it, however.
Mr. HUGHES: We will save an exception.

ORA HALEY, recalled on behalf of the plaintiff, testified as follows:

Direct examination.

By W. T. HUGHES, Esq.:

Q. Mr. Haley, I believe you stated you were president and secretary of the Haley Live Stock Company?
A. President and manager.
Q. Just how long, if at all, prior to August 21st was the company acting as the owner of these cattle in question in the most notorious way—in the courts and by declarations in every way?
A. By application for a writ of injunction in the Federal court—Judge Hallett's court.

Mr. JOHNSON: We object to that as being an indirect way of getting the same matter before the court.

Q. The money that paid this tax you got from Mr. Aicher?
A. Yes, sir.
Q. Was Mr. Aicher present at the application in the Federal
188 court for an injunction, on August 17th?

Mr. JOHNSON: We object.
The COURT: He can ask that.

Q. Was Mr. Aicher present?
A. He was present for the purpose of being a bondsman.
Q. Was he present when the bill was read before Judge Hallett for and on behalf of the company?
A. He was present, to the best of my memory.
Q. I believe you had him present to go on as bondsman for the company if the injunction was granted?
A. That was the purpose of it.
Q. Was it after that that you got the money from him to pay this tax?
A. I think it was the same day.
Q. State precisely what you stated to him you wanted to do with the money.

Mr. JOHNSON: We object.
The COURT: I do not think you can ask that, sir.

Q. Did Mr. Aicher know what you were going to do with that money?
A. Yes, sir.
Q. And are you sure he knew that you were going to pay the taxes on these cattle that were claimed by the county on these cattle for the company to get the release of them?
A. Yes, sir; I explained to him fully.
Q. It was then represented to the Judge, at his chambers, was it not, that the cattle were held until a certain demand was met on them, and that case was presented in the name of the company against the county and the county officials?

Mr. JOHNSON: We object. The records will show that.

The COURT: I do not think that evidence is competent, Mr. Hughes.

189 Q. Did you give instructions to Mr. Rankin as to how the receipt should be given by the county officials for the taxes?

A. Yes, sir; I instructed him very fully to insist that he should take a receipt written from the Haley Live Stock Company, but not to fail to recover the property if he took such receipt as they saw fit to write.

Cross-examination:

By H. B. JOHNSON, Esq.:

Q. What day was it you got that certified check?

A. I think it was the same day that the application was made for this injunction, about the 17th of August, 1888. I do not think it could have been more than a day earlier or a day later.

Q. The application for that injunction was made after the dissolution of the injunctions in the State courts, was it not?

A. I think it was, to the best of my recollection.

Q. You were treasurer of the company?

A. Treasurer.

Q. On the 17th of August?

A. Yes, sir.

Q. And had been from the beginning and to the present time?

A. Yes, sir.

Q. How much money was in the treasury at that time, on that day, and from what source was it received?

A. Well, I don't know as I can answer you.

Q. Have you got any book? Do you keep any book showing the accounts of that company?

A. Yes, sir.

Q. How much money does the books of your company show was in the treasury on that day?

A. I don't know that it shows any money. From my recollection I do not know that there had been any book of that kind opened. The stock had been subscribed and the arrangements made for this organization for some time prior.

Q. Had the company ever held a meeting at that time?

190 Mr. HUGHES: We object.

The COURT: I think you may ask that.

A. The subscribers had held a meeting at Laramie, and we had also met at Council Bluffs, Iowa.

Q. Have you got a record of those meetings?

A. Well, I cannot recollect just when the first meeting as entered upon the record dates, but it was called early.

Q. What property did the company have upon that day other than this property that you sold to yourself as the company?

A. It had these cattle—this property that was conveyed to Kinney.

Q. What obligation did you execute, if any, in the name of the company to raise that money?

A. Raise what money?

Q. The money that you paid your taxes with.

A. Executed to the company, did you ask?

Q. Yes.

Mr. HUGHES: We object, for the reason——

The COURT: No; he can ask that.

A. I do not recollect as I executed any obligation to the company. I had a right to raise the money to relieve the property of the company.

Q. I did not ask that. I asked you what obligation of the company you executed.

A. I executed?

Q. Yes; or the company executed; in the name of the company.

A. Well, I don't know as there was any obligation executed at that time in the name of the company.

Q. Who was there here in Denver at the time you obtained that check that represented the company other than yourself?

A. No one but Mr. Kinney.

Q. Did he execute any obligation or did you for the company to raise that money?

A. I did; Mr. Kinney did not.

Q. You did?

A. Yes, sir.

191 Q. For the company?

A. In behalf of the company.

Q. In the name of the company?

A. Well, I did not do it as manager of the company.

Q. What obligation, then, did you sign as manager of the company?

A. I signed a note.

Q. A note to whom?

A. Well, either to Mr. Aicher or the German National bank; I am not sure which.

Q. Where is that note?

A. I don't know. I presume it is destroyed.

Q. Who signed the note beside yourself?

A. Mr. Aicher must have signed it. My judgment or recollection is that the note was made payable to the order of Frank X. Aicher and that upon its endorsement the money was obtained of the German National bank.

Q. What, then, was Aicher's object in giving a check for it if you got it from the bank on the note?

A. We obtained this certified check for the note. That was the proper thing to do, was it not?

A. In other words, you gave a note—you gave the bank a note—signed by yourself and Kinney and Mr. Aicher, to protect Mr. Aicher's check, did you?

A. That was the way it was arranged, I think.

Q. By whom was that note signed?
A. Well, I cannot recollect, but I think it was signed by myself.
Q. And by Mr. Kinney?
A. I do not think Mr. Kinney signed the note, but I am not sure. It is a long while ago to recollect those little details.
Q. You may state whether the name of the Haley Live Stock Company appeared in that note, either in the body or in the signature of it.

Mr. HUGHES: We object. It is immaterial.

The court overruled said objection; to which ruling of the court the plaintiff, by counsel, excepted.

192 A. I do not recollect.
Q. Mr. Aicher's check that you sent to Mr. Rankin was made payable to your order, was it not?
A. I judge it was.
Q. And you endorsed it?
A. Well, yes; to the best of my recollection.
Q. Personally?
A. That is the way I would make a check to-day, if I was paying a debt for the company.
Q. Then you did the business of the company in your individual name?
A. I did in many matters of that kind.
Q. Has the Haley Live Stock Company got a bank account at all in the name of the company?

Mr. HUGHES: We object. It is immaterial.
The COURT: I think he may ask it, sir.

A. They have not at this date. I keep the bank account in my own name.
Q. Did they have at that date? Did the company have at that date any bank account?
A. I think not. The company was new at that time. We had not got our business systematized.

By W. T. HUGHES, Esq.:

Q. There has been a little uncertainty in your mind as to the date of certain proceedings in this court. Look at that and see if it refreshes your memory. Just look at the concluding part. (Hands paper to witness.)
A. That is only a mistake of a day. My recollection was that it was the 17th, and this affidavit was made, it seems, the 16th day of August, 1888.
Q. You have the company's application to this court then made?
A. This is the application; yes, sir.
Q. All sales of cattle since then have been made in the company's name—since that date?

Mr. JOHNSON: We object.

The COURT: He may ask that.

193 Q. Who receives the money of sales since that date?
A. I as its treasurer receive it and ship the cattle.

FRANK X. AICHER, recalled in behalf of the plaintiff, gave in rebuttal as follows:

Direct examination.

By W. T. HUGHES, Esq.:

Q. Mr. Aicher, have you any recollection of being present at an application for an injunction before Judge Hallett on behalf of the Haley Live Stock Company during the month or thereabouts of August, 1888?

Mr. JOHNSON: We object.

The COURT: I do not think you can ask that, sir. I do not care to hear anything about that injunction.

Mr. HUGHES: It is to fix the date in his mind that I ask it, your honor.

Q. Have you any recollection of the Haley Live Stock Company applying to Judge Hallett for an injunction during the month of August, 1888?

Mr. JOHNSON: We object.

The court overruled said objection.

A. I do not remember whether it was August. I was up at the judge's chambers, on Champa street, with Mr. Haley, yourself, and Mr. Tourtelotte, one day in connection with this case, but I cannot state what time it was exactly.

Q. Did you lend some money to Mr. Haley immediately following that?

A. Yes, sir.

Q. State to the court fully for what purpose you loaned that money and on whose account.

Mr. JOHNSON: We object. He may state what was said.

The COURT: He may state what was said.

194 A. Mr. Haley came to me and told me that he had to pay this tax or the cattle would be sold by the county treasurer of Routt county; he had not time to go to work and fix up matters and get the money of the company, as he would do if he had one or two more days, but in order to do that he would have to get off at Laramie City, which he could not have time to do; he had just barely time, by traveling all day and night, to get there in time for the sale as advertised. I then went with him to the German National bank and got him the money and in due time he paid me back with money from the Haley Live Stock Company.

Q. Did Haley pay you back on his account?

A. He did not.

Q. About how long after that?

A. Two weeks, perhaps.

Q. Did you learn before you loaned the money that the money was to be paid to get the release of the cattle?

A. Yes, sir.

Q. Well, you knew at that time that the company owned the cattle, did you not?

A. Yes, sir.

Cross-examination.

By H. B. JOHNSON, Esq.:

Q. You gave an individual check, Mr. Aicher, to Mr. Haley, did you not?

A. An individual check? No, sir.

Q. You gave a check yourself, did you not, to Mr. Haley?

A. We got the money in the bank and we both signed a note for it.

Q. You and Mr. Haley signed a note for it?

A. Yes, sir.

Q. Individually?

A. Yes; we signed our individual names; that is true.

Q. Well, in what shape was this check?

A. We got a certified check. I suppose I got the money in that shape to help him out. I got the certified check so as to pay the taxes.

Q. In what shape was this certified check?

A. Why, a check from the bank. I know I got a check, I believe, and Mr. Cooper certified it. To tell the truth about it, I think
195 that was the way it was.

Q. Did you have the money there yourself before he gave the check?

A. I had the money there, but in order to have this thing straight we gave a note by itself. We both signed the note.

Q. Then this money secured by this note passed to your credit, and you gave a check? Is that the way of it?

A. Yes, that is right.

Q. Now, you may state whether or not the name of the Haley Live Stock Company was in any manner used in that transaction.

A. It was used in the payment of the money back to me.

Q. Answer my question. In that transaction of getting the money?

A. No, I do not believe it was. I do not remember, but I do not think it was.

Q. How was it used in the repayment of the money to you? How was that money repaid to you?

A. It was repaid to me in a draft when the cattle were sold in Chicago, I believe.

Q. In drafts?

A. Yes, sir; Mr. Haley sent a draft to me.

Q. By whom was that draft drawn? By some bank in Chicago?

A. I cannot tell you; I do not remember it.

Q. Was not the bank draft from——

A. It was a bank draft, but I cannot tell which bank.

Q. Why do you say that the Haley Live Stock Company paid it to you?

A. Because the draft was made payable to the Haley Live Stock Company and endorsed over to me by Haley as manager. That I am very positive about.

Q. That was some two weeks subsequent to the payment of this money?

A. Yes, sir.

Plaintiff and defendant rest.

The above and foregoing was all the testimony offered or introduced in the trial of the above causes.

The COURT: The question for the jury is whether this
196 money is paid by the Haley Live Stock Company or not.

Mr. JOHNSON: Yes, sir; or I suppose it is a question of law whether this tax was valid or not.

The COURT: Yes; I suppose it is.

Mr. JOHNSON: I would like to have the court instruct the jury on that point.

And thereupon the jury were excused until 4 o'clock p. m., and the argument of counsel was had on the above questions and continued until hour of adjournment; during which argument the court ruled that said tax was invalid and could not be collected by said county of Routt.

(Adjourned till to-morrow at 10 a. m., Jan'y 28th.)

JAN'Y 28, 1890—10 a. m.

At the opening of court the argument of counsel was resumed. Upon its completion the defendants, by counsel, asked the court to instruct the jury as follows:

1. If the jury believe from the evidence that the taxes in question were paid by Ora Haley and not by the Haley Live Stock Company, their verdict will be for the defendants in both of the causes now submitted to the jury, and it is wholly immaterial as to whether the Haley Live Stock Company at any subsequent time reimbursed the said Haley for the money so paid.

The court refused to give said instruction to the jury; to which ruling of the court the defendants, by counsel, then and there duly excepted; and thereupon the defendants, by counsel, requested the court to instruct the jury as follows:

2. If the jury believe from the evidence that Ora Haley executed his individual note and obtained a check payable personally to himself and endorsed that check in his individual name and with that check paid the taxes in question, then this was his individual act and no mere intention upon his part to recognize and ratify such act upon the part of the company would operate to
197 make the antecedent payment the act of the company.

The court refused to give said instruction to the jury; to

which ruling of the court the defendant, by counsel, then and there duly excepted; and thereupon the defendants, by counsel, further requested the court to instruct the jury as follows:

3. If the jury believe from the evidence that the Haley Live Stock Company had not become the owner of the property in question on the 21st day of August, at the time the taxes in question were paid, then the payment, even if made by the Haley Live Stock Company, was a voluntary payment and cannot be recovered back.

The court refused to give said instruction to the jury; to which ruling of the court the defendants, by their counsel, then and there duly excepted; and thereupon the defendants, by counsel, further requested the court to instruct the jury as follows:

4. If the jury believe from the evidence that Ora Haley has willfully testified falsely as to any material fact connected with the issues of this cause, then they are authorized to disregard any or all of the testimony of said witness, and it is their duty to so disregard it unless they find that it is corroborated or that it is reasonably consistent in itself.

The court refused to give said instruction to the jury; to which ruling of the court the defendants, by counsel, then and there duly excepted; and thereupon defendants, by counsel, further requested the court to instruct the jury as follows:

5. If the jury believe from the evidence that the property in question was conveyed to the Haley Live Stock Company for the sole purpose of bringing this action, and not for any *bona fide* purpose of vesting the title for all purposes in such company, then they will find for defendants in both of said causes.

The court refused to give said instructions to the jury; to which ruling of the court the defendants, by counsel, then and there duly excepted.

And thereupon the court, upon its own motion, instructed the jury as follows—that is to say:

198 There are two actions here, gentlemen—one against Mr. Wilson and other persons, and one against the board of county commissioners of Routt county—which are substantially for the same cause. They are each tried at the same time, and it is expected that you will give a verdict in each.

As to the first action, against S. D. Wilson and others, there is no cause of action shown against any of the defendants excepting Mr. Wilson alone, so that in that action your verdict will be for the defendants Iles and others without reference to any questions which are presented to your consideration as to Mr. Wilson. In the other the action is against the county to recover for a less sum than in that against Mr. Wilson, but as to that it depends upon the same facts as the suit against Mr. Wilson.

In each case the complaint was that the property of the plaintiff was taken for the payment of a tax which was irregular and void, and as to the matter of the ownership and possession of the property at the time of the seizure, on the evidence of the plaintiff, as shown before you, and by the motion of the defendants' counsel after the evidence was put in, it was shown that the testimony did

not show that the plaintiff, this corporation, was at the time of that seizure either the owner or in possession of the cattle seized, and for that reason it was held that the plaintiff could not recover for the taking of the cattle, whatever view might be taken as to the taxes.

But the testimony also tended to show that the money which had been paid for this tax and in order to procure the release and discharge of the cattle from the custody of the county treasurer, Mr. Wilson, who had them in charge at that time, that this money was paid by the plaintiff company. That testimony was to the effect that the check which was presented for the money drawn by Mr. Aicher, as you remember, upon the request of Mr. Ora Haley or through his order, was a check on the German National bank. It was a certified check and was carried over to be delivered to Mr. Wilson for the payment of his taxes. The man who did this was Mr. Rankin, who had charge of these cattle for Mr. Haley, in the first instance, and then for Mr. Timothy Kinney, who retained him. When he went to make this payment he demanded a receipt in the name of The Haley Live Stock Company, the plaintiff in this action, and claimed to make the payment on behalf of the Haley Live Stock Company. Mr. Wilson and his advisers there refused to accept such payment and would only make the receipt in the name of Haley, and it was accordingly so made.

The testimony shows that this payment was made under protest, or, as we say, by compulsion, in order to get possession of the cattle and to prevent them from being sold to satisfy the tax; and under such circumstances, when a payment is made in that way, the person making it, whether he be the person against whom the tax is levied or a stranger, acting for that person, he, if the tax is seen to be irregular and void, may recover the money. It is true that one who pays his tax without protest and without making any complaint cannot afterwards ask that it be refunded to him. He is taken to have settled and adjusted the whole matter. If he goes and pays the tax without making any protest against it and without making any charge that it was in any way unjust or wrong he is held to have acquiesced in the action of the authorities and to be concluded by his act. But if when he is going to pay his taxes he declares his unwillingness to pay it and claims that he is doing it only to avoid the sale of his property—in other words that he makes payment of it under protest—then he may
199 have his action for the recovery of that money; and it is a question that can be presented with respect to the validity of the tax. That is what was done in this case; and when the evidence was all received, as to the nature of the assessment-roll that was out and of the treasurer's roll as it came into his hands, the judgment of the court was that this tax was void for uncertainty; that there was nothing put in the assessor's roll to show the amount of values except the figures, which were not properly designated to show that they represented money and to show the amount of the taxes levied. Some effort was made about three years after the tax was said to have been levied, in the year 1887, by the officers of the county to

correct the roll by making some additions to it, but it was found that he had no authority to do so. He might perhaps have made a new assessment if he could have determined what property was subject to taxation in 1884, although it was a long time after that that he was seeking to do anything in the premises; but that he did not attempt to do. He thought he would make good the roll by the addition of matters in which it was deficient, and for that he had no authority, so that we feel compelled to regard his roll as having been void from the first and as conferring upon the county treasurer of the county no authority whatever to seize these cattle and compel Mr. Haley to pay this money; so that as to this matter your taking it to be true that Mr. Wilson had no authority in the premises to exact from any one this sum of money, the question, then, for your consideration is whether this sum was paid by this plaintiff, The Haley Live Stock Company, as it is called, or by Mr. Haley on his own account. It is true that in a certain sense it was paid by Mr. Haley—that is, he got the money through the aid and assistance of Mr. Aicher from the German National bank, and it is not plainly disclosed as to in what manner he was proceeding—that is, what was in his mind at the time he got this money; and the defendant alleges that the whole scheme of organizing this company and the making of this payment and all that has been done by the company was a mere pretence and sham, and ought to be so regarded by the jury; that upon all that is disclosed by the testimony here you ought not to recognize this corporation as having any existence whatever; that it is a delusion and intended so to be, and that Mr. Haley's act in getting the money was a pretence only and should not be recognized and given any force or validity whatever; that what was done with respect to getting this money and paying it over is to be taken by you that it was only Mr. Haley that did that, and that this company has no standing whatever. Now, this is a matter for your consideration, whether you can say that under the circumstances disclosed to you that this was a payment by said plaintiff through Mr. Haley, or was not his money, and that it made this payment to the treasurer, or that it was made by Mr. Haley alone, and that the company was not entitled to recognition as being the party which made the payment. In the consideration of that matter you can go upon all the evidence which has been put before you. It was alleged that the company afterwards paid the money into the German National bank. I have not much to say about that. Counsel have commented upon this case with some bitterness and have shown a good deal of feeling about it. This litigation, it appears, has been in the courts of the State, and has been somewhat protracted, and they have got into a good deal more temper and passion about it than they ought to have. I do not see that there is anything extraordinary in the whole business or anything about which we should show such temper. We ought to determine these things dispassionately and without considering anything whatever as to matters of prejudice and feeling.

I think, gentlemen, I can say to you, if you believe from the evi-

dence that this money was paid over by the Haley Live Stock Company and not by Mr. Haley himself, that then the plaintiff would have the right to recover it back, as having been exacted under circumstances which showed no authority on the part of Mr. Wilson to get it.

Now, as to the amount, the amount actually paid Mr. Wilson, as taken from his receipts, was $12,725.52, and that is the most the plaintiff will be entitled to, if you find for plaintiff, together with interest from Aug. 21, 1888, to the present time, at ten per cent. per annum. As to the county, the amount that went into the county treasury was $8,120, a less sum going to the county, as some portion of this money belonged to the State. Of course plaintiff cannot be entitled to a verdict for more than the county got. Not for the whole sum, but for the part which it got, $8,120.

To the above charge of the court to the jury, and to each and every part thereof, the defendants objected and excepted at the time, and to that part of said charge which is as follows: "The testimony shows that this payment was made under protest, or, as we say, by compulsion, in order to get possession of the cattle and to prevent them from being sold to satisfy the tax; and under such circumstances when a payment is made in that way the person making it, whether he be the person against whom the tax is levied or a stranger acting for that person, he, if the tax is seen to be irregular and void, may recover his money," the defendants excepted upon the ground that a stranger to a tax could not pay the same and then sue to recover it back.

And to that part of the charge which is as follows: "And when the evidence was all received as to the nature of the assessment-roll that was out and of the treasurer's roll as it came into his hands the judgment of the court was that this tax was void for uncertainty; that there was nothing put in the assessor's roll to show the amount of values, except the figures, which were not properly designated to show that they represented money and to show the amount of the taxes levied. Some effort was made about three years after the tax was said to have been levied, in the year 1887, by the officers of the county, to correct the roll by making some additions to it, but it was found that he had no authority to do so. He might perhaps have made a new assessment if he could have determined what property was subject to taxation in 1884, although it was a long time after that that he was seeking to do anything in the premises, but that he did not attempt to do. He thought he would make good the roll by the addition of matters in which it was deficient, and for that he had no authority, so that we feel compelled to regard his roll as having been void from the first and as conferring upon the county treasurer of the county no authority whatever to seize these cattle and compel Mr. Haley to pay the money," the defend-
ants excepted upon the ground that said assessment and
201 treasurer's rolls were not originally void, and that if originally void they had been made valid by proper amendments.

And to that part of the charge which is as follows: "The question then for your consideration is whether this sum was paid by

this plaintiff, The Haley Live Stock Company as it is called, or by Mr. Haley on his own account. It is true that in a certain sense it was paid by Mr. Haley—that is, he got the money through the aid and assistance of Mr. Aicher from the German National bank, and it is not plainly disclosed as to in what manner he was proceeding—that is, what was in his mind at the time he got this money, and the defendant alleges that the whole scheme of organizing this company and the making of this payment and all that has been done by the company was a mere pretence and sham and ought to be so regarded by the jury; that upon all that is disclosed by the testimony here you ought not to recognize this corporation as having any existence whatever; that it is a delusion and intended so to be, and that Mr. Haley's act in getting the money was a pretence only and should not be recognized and given any force and validity whatever; that what was done with respect to getting this money and paying it over is to be taken by you that it was only Mr. Haley that did that, and that this company has no standing whatever. Now, this is a matter for your consideration, whether you can say that under the circumstances disclosed to you that this was a payment by said plaintiff through Mr. Haley or was not his money, and that it made this payment to the treasurer, or that it was made by Mr. Haley alone, and that the company was not entitled to recognition as being the party which made the payment. In the consideration of that matter you can go upon all the evidence which has been put before you," the defendants excepted on the grounds: (1) It stated the theory of defendants, but did not inform the jury that if they found that theory to be true they should find a verdict for defendants and virtually withdraw this entire theory from the consideration of the jury; and (2) it authorized a verdict for plaintiff even though the jury may have believed that the pretended company was organized and owned by Haley and the property fraudulently transferred to it for the sole purpose of bringing this action in the Federal court.

And to that part of the said charge which is as follows: "It was alleged that the company afterwards paid the money into the German National bank. I have not much to say about that. Counsel have commented upon this case with some bitterness, and have shown a good deal of feeling about it. This litigation, it appears, has been in the courts of the State and has been somewhat protracted, and they have got into a good deal more temper and passion about it than they ought to have. I do not see that there is anything extraordinary in this whole business, or anything about which we should show such temper. We ought to determine these things dispassionately and without considering anything whatever as to matters of prejudice and feeling," the defendants excepted on the ground that it was an unwarranted comment by the court
202 upon the case as presented to the jury.

And to that part of the charge which is as follows: "I think, gentlemen, I can say to you if you believe from the evidence that this money was paid over by the Haley Live Stock Company and not by Mr. Haley himself that then the plaintiff would have the

right to recover it back as having been exacted under circumstances which showed no authority on the part of Mr. Wilson to get it," the defendants excepted on the ground that it assumed the invalidity of the tax proceedings in the case.

I have no objection to the record showing defendant excepted to the charge of the court distributively and not generally.

W. T. HUGHES.

(Indorsed:) 2340. Circuit court U. S. The Haley Live Stock Co. *vs.* Samuel D. Wilson *et al.* Amendments to bill of exceptions. Filed Oct. 11, 1890. William A. Willard, clerk.

And thereupon, after argument of the respective counsel, the jury were permitted to retire and deliberate upon their verdict; and thereafter and on the 28th day of January the jury returned and gave their verdict in favor of the plaintiff and against the defendant Wilson as follows:

JAN. 28TH, 1890.

To the Hon. Judge Hallett:

We, the jury in the case Haley Live Stock Co. *vs.* Wilson, treasurer of Routt Co., as to defendant Wilson find for the plaintiff in the sum of $5,266.92, and we find the issues for the other of the said defendants.

GEO. J. KINDEL, *Foreman.*

To which the defendant Wilson, by counsel, then and there duly excepted and gave notice of a motion for a new trial; and thereafter and on the 7th day of February, A. D. 1890, the defendants, by their counsel, filed a motion for a new trial of said cause; which said motion is in words and figures following, omitting the caption thereof:

Now comes the defendants in the above-entitled cause
203 and move the court to set aside the verdict of the jury rendered herein and grant a new trial for the following reasons:

1. The court erred in sustaining demurrers to portions of the answer, amended answer, and second amended answer of de-
204 fendants, and in sustaining motions to strike out portions of all of the said answer, amended answer, and second amended answer of defendants, which errors are more particularly shown by the minutes and record of the court.

2. The court erred in requiring defendants to go to trial without any answer on file, and in refusing to entertain the motion to vacate the order striking out the second amended answer of defendants.

3. The court erred in overruling the motion of defendants, made at the close of the evidence of plaintiff, to instruct the jury to find a verdict for defendants.

4. The court erred on the decision of said motion of defendants to instruct the jury to find a verdict for defendants in declaring the law to be as follows:

The remaining questions, under these complaints, is that the

plaintiff may sustain an action for the money paid to procure a release of the cattle. The evidence so far tends to prove that this was paid by the plaintiff in the suit, and if it be assumed that the plaintiff was paying it for Kinney, or whoever was the owner of the cattle at that time, to secure the release of them, with a view of holding them and acquiring property in them, I see no serious objection to the proposition that the action may be maintained by the plaintiff to recover this money. The circumstance that the plaintiff was a stranger to the proceeding to collect the tax—that is, the tax was not levied against it, nor recoverable against it—is not material, as it seems to me. If the tax is void, one which could not be collected against or from the person upon whom it was levied, a stranger paying the amount for the use of that person, or in any way whatever, ought to be able to recover his money.

5. The court erred on the decision of said motion of defendants to instruct the jury to find a verdict for defendants, after having decided that an action of trespass could not be maintained, in holding that the action could be turned into an action for money paid, and in declaring the law upon this subject as follows:

The difficulty arises as to the form of the complaint in each case. It is unquestionably an action for property and injury to property, and the mention about the tax and the payment of it is incidental to that, and it is carrying the doctrine of construction as to liberality allowed in pleading to a great length to say that under such form of complaint the action may be maintained for money without reference to the cause of action stated as to the injury to the cattle; but it is nevertheless true that it is stated in each complaint that the sum of money was exacted for releasing the stock from
205 the levy, and in each case there is a prayer for judgment for this amount, $12,742.52, and interest. Under the present impression I have I think the action may perhaps be allowed to stand for that sum, denying to the plaintiff the right to recover for the cattle or the injury to them as matters occurring before it acquired title to the property or possession of that property.

6. The court erred on the decision of the motion of defendants to instruct the jury to find a verdict for defendants in declaring the law as to the jurisdiction of the court as follows:

In so far as it is alleged that the company was organized with a view to maintaining a suit in this court on matters which had previously arisen between the plaintiff, or Mr. Haley, and the defendant, I have no doubt that the evidence establishes that fact that the company was so organized. My understanding is that it does not defeat the suit in itself, provided that the plaintiff has a supposed cause of action for the money which was paid to secure the possession of the property. In other words, if the jury should be satisfied that this money was paid by the plaintiff, and should also be satisfied that the tax was void and one which could not be collected, the circumstance that the company was organized with the direct purpose on the part of those organizing to maintain a suit in this court does not defeat the action. The cases cited by counsel are cases where the bonds and other instruments upon which suit was

founded were assigned by the owners of them to the plaintiff merely to bring suit upon them. By the assignment the plaintiff acquired no interest in the choses in action, and in that case, where one individual assigns to another an instrument or other cause of action with the intent that the other was to bring suit upon it and the proceeds to be turned over to the assignor whenever it could be collected, there is no question whatever of the fact that the assignment is collusive and made for the purpose of maintaining an action in the Federal court. But that is not this case if it be assumed that the plaintiff be paid the money for getting possession of these cattle, and that the money belonged to it, and that the tax was one which could not be collected.

7. The court erred in holding and in charging the jury that a stranger to a tax and a person who has gained no title or possession to property distrained for such tax can voluntarily pay the same and then recover it back if the tax is void, and in declaring the law upon this subject as follows:

The testimony shows that this payment was made under protest or, as we say, by compulsion in order to get possession of the cattle and to prevent them from being sold to satisfy the tax, and under such circumstances when a payment is made in that way the person making it, whether he be the person against whom the tax is levied or a stranger acting for that person, he, if the tax is seen to be irregular and void, may recover his money.

8. The court erred in charging the jury that the assessment-roll and the treasurer's roll as it came into his hands were
206 void, and that the treasurer had no authority to amend the same, and in declaring the law upon this subject as follows:

And when the evidence was all received as to the nature of the assessment-roll that was out and of the treasurer's roll as it came into his hands the judgment of the court was that this tax was void for uncertainty; that there was nothing put in the assessor's roll to show the amount of values except the figures, which were not properly designated to show that they represented money and to show the amount of the taxes levied. Some effort was made about three years after the tax was said to have been levied in the year 1887 by the officers of the county to correct the roll by making some additions to it, but it was found that he had no authority to do so. He might perhaps have made a new assessment if he could have determined what property was subject to taxation in 1884, although it was a long time after that that he was seeking to do anything in the premises, but that he did not attempt to do. He thought he would make good the roll by the addition of matters in which it was deficient, and for that he had no authority, so that we feel compelled to regard his roll as having been void from the first and as conferring upon the county treasurer of the county no authority whatever to seize these cattle and compel Mr. Haley to pay the money.

9. The court erred in charging the jury as follows:

The question, then, for your consideration is whether this sum was paid by this plaintiff, The Haley Live Stock Company, as it is called,

or by Mr. Haley on his own account. It is true that in a certain sense it was paid by Mr. Haley—that is, he got the money through the aid and assistance of Mr. Aicher from the German National bank, and it is not plainly disclosed as to in what manner he was proceeding—that is, what was in his mind at the time he got this money, and the defendant alleges that the whole scheme of organizing this company and the making of this payment and all that has been done by the company was a mere pretence and sham, and ought to be so regarded by the jury; that upon all that is disclosed by the testimony here you ought not to recognize this corporation as having any existence whatever; that it is a delusion and intended so to be, and that Mr. Haley's act in getting the money was a pretence only and should not be recognized and given any force and validity whatever; that what was done with respect to getting this money and paying it over is to be taken by you that it was only Mr. Haley that did that, and that this company has no standing whatever. Now, this is a matter for your consideration, whether you can say that under the circumstances disclosed to you that this was a payment by said plaintiff through Mr. Haley or was not his money, and that it made this payment to the treasurer, or that it was made by Mr. Haley alone, and that the company was not entitled to recognition as being the party which made the payment. In the consideration of that matter you can go upon all the evidence which has been put before you.

The court erred in that part of its charge last above quoted, in this: (1) It stated the theory of defendants, but did not inform the jury that if they found that theory to be true they should
207 find a verdict for defendants, and virtually withdrew this entire theory from the consideration of the jury; and (2) it authorized a verdict for plaintiff, even though the jury may have believed that the pretended company was organized and owned by Haley and the property fraudulently transferred to it for the sole purpose of bringing this action in the Federal court.

10. The court erred in charging the jury as follows:

It was alleged that the company afterwards paid the money into the German National bank. I have not much to say about that. Counsel have commented upon this case with some bitterness and have shown a good deal of feeling about it. This litigation, it appears, has been in the courts of the State and has been somewhat protracted, and they have got into a good deal more temper and passion about it than they ought to have. I do not see that there is anything extraordinary in this whole business or anything about which we should show such temper. We ought to determine these things dispassionately and without considering anything whatever as to matters of prejudice and feeling.

11. The court erred in charging the jury as follows:

I think, gentlemen, I can say to you if you believe from the evidence that this money was paid over by the Haley Live Stock Company and not by Mr. Haley himself, that then the plaintiff would not have the right to recover it back as having been exacted under

circumstances which showed no authority on the part of Mr. Wilson to get it.

12. The verdict of the jury is wholly unsustained by the evidence in this: The evidence shows that the payment was made personally by Haley and not by the Haley Live Stock Company.

13. The verdict of the jury is against the law.

14. The court committed errors in law at the time, which were excepted to by defendants.

15. The court admitted incompetent evidence upon the part of the plaintiff, which was objected and excepted to by defendants.

16. The court excluded relevant and material evidence offered by defendant-, and which exclusion was excepted to by defendants.

17. The court erred in refusing to give instructions to the jury asked for by defendants.

And thereafter and on the 8th day of March, 1890, said
208 motion coming on to be heard, the court, being fully advised in the premises, overruled said motion for a new trial, and judgment was entered upon the verdict; to which ruling of the court the defendants, by counsel, then and there duly excepted and prayed an appeal to the Supreme Court of the United States. Said appeal was granted, and defendants were thereupon given — days to file an acceptable appeal bond in the sum of — dollars and *was* allowed 30 days from March 11th, 1890, in which to file their bill of exceptions in said cause.

And forasmuch as the above matters and things do not fully appear of record in said cause, defendants herewith present their bill of exceptions, and pray that the same may be signed and sealed by the judge of said court, as by the statute in such case made and provided, which is accordingly done this 15 day of April, 1890.

MOSES HALLETT, [SEAL.]
Judge U. S. Circuit Court for Dist. of Colorado.

(Indorsed:) 2340. Circuit court U. S. The Haley Live Stock Co. *vs.* S. D. Wilson *et al.* Bill of exceptions. Deposited in clerk's office April 7, 1890. William A. Willard, clerk, by F. W. Tupper, deputy clerk. Filed Apr. 15, 1890. William A. Willard, clerk.

And afterwards and on, to wit, the 9th day of May, A. D. 1890, the same being one of the regular juridical days of the May term, A. D. 1890, of said court—present, the Honorable Moses Hal-
209 lett, district judge—the following further proceeding was had and entered of record in said court and in said cause, to wit:

Order: Execution Stayed 30 Days.

THE HALEY LIVE STOCK COMPANY
vs.
S. D. WILSON *et al.* } 2340. Action for Damages.

At this day comes the said defendant, S. D. Wilson, by D. E. Parks, Esq., his attorney, and on his motion it is ordered by the court that

execution herein be, and is hereby, stayed for thirty (30) days from this day.

And afterwards and on, to wit, the 7th day of June, A. D. 1890, the same being one of the regular juridical days of the May term, A. D. 1890, of said court—present, the Honorable Moses Hallett, district judge—the following further proceeding was had and entered of record in said court and in said cause, to wit:

Order: Writ of Error to Issue.

THE HALEY LIVE STOCK COMPANY
vs.
S. D. WILSON, THOMAS H. ILES, S. H. THARP, Louis H. Breeze, Lemuel L. Breeze, and John M. Breeze.
} 2340. Action for Damages.

It appearing to the court that on the 28th day of April last D. E. Parks, Esq., and H. B. Johnson, Esq., attorneys for the said defendant, Samuel D. Wilson, applied to the clerk of this court for a writ of error from the Supreme Court to this court in this cause, and that said writ of error was not then issued, it is ordered by the court that the said writ be issued and served now as of the said 28th day of April, A. D. 1890.

And afterwards and on the same day, to wit, the 7th day
210 of June, A. D. 1890, came again the said defendant, by his attorneys aforesaid, and sued out of and under the seal of said court a writ of error to the Supreme Court of the United States, and the said writ of error and return thereof is hereto attached, to wit:

Writ of Error.

211 Writ of error to — court U. S., district of Colorado.

THE UNITED STATES OF AMERICA.

UNITED STATES OF AMERICA,
District of Colorado,
} *ss:*

The President of the United States to the judges of the circuit court of the United States for the district of Colorado, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, between the Haley Live Stock Company and S. D. Wilson and others, a manifest error hath happened, to the great damage of the said S. D. Wilson, treasurer of Routt county, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the

United States, together with this writ, so that you have the same at Washington, D. C., on the thirteenth day of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 28th day of April, in the year of our Lord one thousand eight hundred and ninety, and of the Independence of the United States the 114th year.

Seal United States Circuit Court, District of Colorado.

WILLIAM A. WILLARD, *Clerk.*

Allowed by—

——— ———, *Judge.*

212 [Endorsed:] Gen. No., 2340. Circuit court of the United States. S. D. Wilson, plaintiff in error, *vs.* The Haley Live Stock Company. Writ of error to circuit court U. S., district of Colorado. Filed in circuit court of the U. S. this 7th day of June, A. D. 1890, as of the 28th day of April, A. D. 1890. William A. Willard, clerk. H. D. Johnson, D. E. Parks, attorney- for plaintiff in error.

Return.

THE UNITED STATES OF AMERICA, *District of Colorado,* } *ss:*

In obedience to the command of the within writ I herewith transmit to the honorable Supreme Court of the United States a duly certified transcript of the record and proceedings in the within-entitled case, together with all things concerning the same.

Witness my hand and the seal of said circuit court, at Denver, in said district, this 11th day of October, 1890.

[Seal United States Circuit Court, District of Colorado.]

WILLIAM A. WILLARD, *Clerk,*
By F. W. TUPPER, *Deputy Clerk.*

The defendant having given the security required by law, this writ becomes a supersedeas by an order endorsed on the bond by the Honorable Samuel F. Miller, associate justice of the Supreme Court of the United States, on the 15th day of August, A. D. 1890.

[Seal United States Circuit Court, District of Colorado.]

Teste: WILLIAM A. WILLARD, *Clerk,*
By F. W. TUPPER, *Deputy Clerk.*

Denver, Colorado, August 15th, 1890.

And afterwards and on, to wit, the 15th day of August, A. D. 1890, came again the said defendant, by his attorneys aforesaid, and sued

out of said court a citation to the Supreme Court of the United States, and the said citation and proof of service thereof is hereto attached, to wit:

Citation.

213 Citation U. S. — Court.

THE UNITED STATES OF AMERICA, }
District of Colorado. }

The United States of America to the Haley Live Stock Company, defendant in error, Greeting:

You are hereby cited and admonished to be and appear at a term of the Supreme Court of the United States of America, to be holden at Washington, District of Columbia, on the thirteenth day of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the district of Colorado, wherein Samuel D. Wilson, county treasurer of the county of Routt, is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Samuel F. Miller, judge of the Supreme Court of the United States, this 15th day of August, in the year of our Lord one thousand eight hundred and ninety.

SAM. F. MILLER, *Judge.*

214 [Endorsed:] Gen. No., 2340. Circuit court of the United States, district of Colorado. Samuel D. Wilson, treasurer, etc., plaintiff in error, *vs.* The Haley Live Stock Company, defendant in error. Citation. Filed in circuit court of the U. S. this 22d day of August, A. D. 1890. William A. Willard, clerk, by F. W. Tupper, deputy clerk. D. E. Parks and H. B. Johnson, attorney for plaintiff in error.

Proof of Service.

THE UNITED STATES OF AMERICA, }
District of Colorado, } *ss:*

On this 22d day of August, A. D. 1890, personally appeared Charles W. Bishop before me, the subscriber, a clerk of the circuit court of the United States for the district of Colorado, and makes oath that he delivered a true copy of the within citation to W. T. Hughes, Esq., attorney for The Haley Live Stock Company, defendant in error, at Denver, in said district, on the 22d day of August.

CHARLES W. BISHOP.

Sworn to and subscribed before me this 22d day of August, A. D. 1890.

[Seal United States Circuit Court, District of Colorado.]

WILLIAM A. WILLARD, *Clerk,*
By F. W. TUPPER, *Deputy Clerk.*

215 And afterwards and on, to wit, the 18th day of August, A. D. 1890, came again the said defendant, by his attorneys aforesaid, and filed in said court and in said cause his bond on writ of error, and the said bond is in words and figures as follows, to wit:

Bond on Writ of Error.

In the Supreme Court of the United States of America, *ss:*

SAMUEL D. WILSON, County Treasurer of the County of Routt, Colorado, Plaintiff in Error, *vs.* THE HALEY LIVE STOCK COMPANY, Defendant in Error.	Security on Error to the Circuit Court of the United States for the District of Colorado.

Know all men by these presents that we, Samuel D. Wilson, county treasurer of the county of Routt, Colorado, plaintiff in error, as principal, and The County of Routt, Colorado; Harvey Woolery, E. Shelton, Robert P. Williams, S. B. Reid, S. D. Wilson, and James W. Whetstone, as sureties, are held and firmly bound unto The Haley Live Stock Company, defendant in error (plaintiff in the United States circuit court of Colorado), in the full and just sum of twelve thousand ($12,000) dollars, to be paid to the said The Haley Live Stock Company, defendant in error, etc., and its assigns and successors; to which payment, well and truly to be made, we bind ourselves, our and each of our heirs, executors and administrators, successors and assigns, jointly and severally, firmly by these presents.

Sealed with our hands and dated this 10th day of May, in the year of our Lord one thousand eight hundred and ninety (1890).

Whereas lately, at the November term, A. D. 1889, of the circuit court of the United States for the district of Colorado, in a suit
216 pending in said court between The Haley Live Stock Company as plaintiff and Samuel D. Wilson, county treasurer of the county of Routt, Colorado, and others as defendants, judgment was rendered against the said Samuel D. Wilson, as treasurer of the county of Routt, Colorado, as defendant, for the sum of five thousand two hundred and sixty-six and $\frac{90}{100}$ dollars ($5,266.90), damages, besides costs of suit, and he, the said Samuel D. Wilson, treasurer, as plaintiff in error, hath prosecuted a writ of error to the Supreme Court of the United States of America to *recover* the said judgment of the said circuit court of the United States of the eighth judicial circuit, held within and for the district of Colorado, and a citation directed to the said The Haley Live Stock Company, defendant in error, citing and admonishing it to be and appear at a term of the Supreme Court of the United States to be held at Washington, D. C., on the fourteenth day of October, A. D. 1890, next, having been applied for:

Now, the condition of the above obligation is such that if the said Samuel D. Wilson, county treasurer of the county of Routt, Colo-

rado, plaintiff in error, shall prosecute his said writ of error to effect and answer all damages and costs if he shall fail to make good his said plea, then the above obligation to be void; otherwise to remain in full force and virtue.

SAMUEL D. WILSON, [SEAL.]
County Treasurer of the County of Routt, Colorado, Plaintiff in Error.

THE COUNTY OF ROUTT, COLORADO,
By ROBERT P. WILLIAMS, [SEAL.]
Chairman of Board of County Commissioners of the County of Routt, Colorado, and Attorney-in-Fact for said County.

SAMUEL D. WILSON. [SEAL.]
ROBERT P. WILLIAMS, [SEAL.]
County Commissioner of County Routt, Colo.

E. SHELTON. [SEAL.]
S. B. REID. [SEAL.]
217 JAMES W. WHETSTONE. [SEAL.]
HARVEY WOOLERY, [SEAL.]
County Commissioner of County Routt, Colo.

[Seal Routt County.]

Sealed and delivered in presence of—
F. E. MILNER.

Approved Aug. 15, 1890.

SAM. F. MILLER,
U. S. Sup. Court Judge.

This bond is to operate as a supersedeas.

SAM. F. MILLER.

Justification.

UNITED STATES OF AMERICA, *District of Colorado,* } ss:

STATE OF COLORADO, *County of Routt,* } ss:

Robert P. Williams, surety on the foregoing and annexed bond, being duly sworn, deposes and says that he is a resident of said county and district and worth in real and personal — ten thousand dollars, the sum below set opposite his name—that is to say—

As to real, three thousand dollars;

As to personal, seven thousand dollars—

over and above all his just debts and liabilities in property not exempt by law from execution.

ROBERT P. WILLIAMS.

Subscribed and sworn to before me this 15 day of May, A. D. 1890.

[SEAL.] E. SHELTON,
Notary Public.

My commission expires July 19th, 1890.

218 *Justification.*

UNITED STATES OF AMERICA, } ss:
District of Colorado, }

STATE OF COLORADO, } ss:
County of Routt, }

E. Shelton, surety on the foregoing and annexed bond, being duly sworn, deposes and says that he is a resident of said county and district and worth in real and personal property the sum below set opposite his name—that is to say—

As to real estate, three thousand dollars;

As to personal property, one thousand dollars—

over and above all his just debts and liabilities in property not exempt by law from execution.

E. SHELTON.

Subscribed and sworn to before me this 16th day of May, A. D. 1890.

[SEAL.] F. E. MILNER,
Notary Public.

My com. expires May 20, 1893.

Justification.

UNITED STATES OF AMERICA, } ss:
District of Colorado, }

STATE OF COLORADO, } ss:
County of Routt, }

S. B. Reid, surety on the foregoing and annexed bond, being duly sworn, deposes and says that he is a resident
219 of said county and district and worth in real & personal property three thousand dollars, the sum below set opposite his name—that is to say—

As to real estate, two thousand dollars;

As to personal property, one thousand dollars—

over and above all his just debts and liabilities in property not exempt by law from execution.

S. B. REID.

Subscribed and sworn to before me this 15th day of May, A. D. 1890.

[SEAL.] E. SHELTON,
Notary Public.

My commission expires July 19th, 1890.

Justification.

UNITED STATES OF AMERICA, *District of Colorado*; } ss:

STATE OF COLORADO, *County of Routt*, } ss:

James M. Whetstone, surety on the foregoing and annexed bond, being duly sworn, deposes and says that he is a resident of said county and district and worth in real estate $2,500.00, the sum below set opposite his name—that is to say:

As to real estate, two thousand five hundred dollars—

over and above all his just debts and liabilities in property not exempt by law from execution.

JAMES M. WHETSTONE.

Subscribed and sworn to before me this 15 day of May, A. D. 1890.

[SEAL.] E. SHELTON,
Notary Public.

My commission expires July 19th, 1890.

220 *Justification.*

UNITED STATES OF AMERICA, *District of Colorado*, } ss:

STATE OF COLORADO, *County of Routt*, } ss:

Samuel D. Wilson, surety on the foregoing and annexed bond, being duly sworn, deposes and says that he is a resident of said county and district and worth in real and personal property the sum below set opposite his name—that is to say:

As to real estate, one thousand dollars;

As to personal property, fifteen hundred dollars—

over and above all his just debts and liabilities in property not exempt by law from execution.

SAMUEL D. WILSON.

Subscribed and sworn to before me this 16th day of May, A. D. 1890.

[SEAL.] F. E. MILNER,
Notary Public.

My com. expires May 20, 1893.

(Indorsed:) 2340. Circuit court of the United States, district of Colorado. The Haley Live Stock Company, plaintiff, *vs.* Samuel D. Wilson, county treasurer, *et al.*, defendants. Bond on error to Supreme Court of United States. $12,000.00. Filed this 18th day of

August, A. D. 1890. William A. Willard, clerk, by F. W. Tupper, deputy clerk.

And afterwards and on, to wit, the 23d day of August, A. D. 1890, came again the said defendant, by his attorneys aforesaid,
221 and filed in said court and in said cause his assignment of errors, and the said assignment of errors is in words and figures as follows, to wit:

Assignment of Errors.

UNITED STATES OF AMERICA, *District of Colorado,* } *ss:*

In the Circuit Court of the United States within and for the District of Colorado.

THE HALEY LIVE STOCK CO., Plaintiff,
vs.
SAMUEL D. WILSON *et al.*, Defendants.

Now comes the said Samuel D. Wilson and says that in the record and proceedings in said cause there is manifest error, in this:

I. The court erred in excluding the records of the supreme court of Colorado upon which the decisions in Breeze *v.* Haley (10 Colo., 5) and Breeze *v.* Haley (11 Colo., 351) were rendered.

II. The court erred in refusing to give instructions numbered one, two, three, four, and five asked by defendants.

III. The court erred in overruling the motion of defendants, made at the close of the evidence of plaintiff, to instruct the jury to find a verdict for defendants.

IV. The court erred, on the decision of said motion of defendants to instruct the jury to find a verdict for defendants, in declaring the law to be as follows:

"The remaining questions under these complaints is that the plaintiff may maintain an action for the money paid to procure a release of the cattle. The evidence so far tends to prove that this was paid by the plaintiff in the suit, and if it be assumed that the plaintiff was paying it for Kinney, or whoever was the owner of the cattle at that time, to secure the release of them with a view of hold-
ing them and acquiring property in them, I see no serious
222 objection to the proposition that the action may be maintained by the plaintiff to recover this money. The circumstance that the plaintiff was a stranger to the proceeding to collect the tax—that is, the tax was not levied against it nor recoverable against it—is not material, as it seems to me. If the tax is void, one which could not be collected against or from the person upon whom it was levied, a stranger paying the amount for the use of that person or in any way whatever ought to be able to recover his money."

V. The court erred, on the decision of said motion of defendants to instruct the jury to find a verdict for the defendants, after having decided that an action of trespass could not be maintained, in hold-

ing that the action could be turned into an action for money paid and in declaring the law upon this subject as follows:

"The difficulty arises as to the form of the complaint in each case. It is unquestionably an action for property and injury to property, and the mention about the tax and the payment of it is incidental to that; and it is carrying the doctrine of construction as to liberality allowed in pleading to a great length to say that under such form of complaint the action may be maintained for money without reference to the cause of action stated as to the injury to the cattle. But it is nevertheless true that it is stated in each complaint that the sum of money was exacted for releasing the stock from the levy, and in each case there is a prayer for judgment for this amount, $12,742.52, and interest. Under the present impression I have I think the action may perhaps be allowed to stand for that sum, denying to the plaintiff the right to recover for the cattle or the injury to them as matters occurring before it acquired title to the property or possession of that property."

VI. The court erred, on the decision of the motion of defendants to instruct the jury to find a verdict for defendants, in declaring the law as to the jurisdiction of the court as follows:

"In so far as it is alleged that the company was organized with a view to maintaining a suit in this court on matters which had previously arisen between the plaintiff or Mr. Haley and the defendant, I have no doubt that the evidence establishes that fact, that the company was so organized. My understanding is that it does not defeat the suit in itself, provided that the plaintiff has a supposed cause of action for the money which was paid to secure the possession of this property. In other words, if the jury should be satisfied that this money was paid by the plaintiff, and should also be satisfied that the tax was void and one which could not be collected, the circumstance that the company was organized with the direct purpose on the part of those organizing to maintain a suit in this court does not defeat the action. The cases cited by counsel are cases where the bonds and other instruments upon which the suit was founded were assigned by the owners of them to the plaintiff merely to bring suit upon them. By the assignment the plaintiff acquired no interest in the choses in action, and in that
223 case, where one individual assigns to another an instrument or other cause of action with the intent that the other was to bring suit upon it and the proceeds to be turned over to the assignor whenever it should be collected, there is no question whatever of the fact that the assignment is collusive and made for the purpose of maintaining an action in the Federal court. But that is not this case, if it be assumed that the plaintiff paid the money for getting possession of those cattle, and that the money belonged to it, and that the tax was one which could not be collected."

VII. The court erred in holding and in charging the jury that a stranger to a tax and a person who has gained no title or possession to property distrained for such tax can voluntarily pay the same and then recover it back if the tax is void, and in declaring the law upon this subject as follow-:

"The testimony shows that this payment was made under protest, or, as we say, by compulsion, in order to get possession of the cattle and to prevent them from being sold to satisfy the tax, and under such circumstances when a payment is made in that way the person making it, whether he be the person against whom the tax is levied or a stranger acting for that person, he, if the tax is seen to be irregular and void, may recover his money."

VIII. The court erred in charging the jury that the assessment-roll and the treasurer's roll as it came into his hands were void, and that the treasurer had no authority to amend the same, and in declaring the law upon these subjects as follows:

"And when the evidence was all received as to the nature of the assessment-roll that was out and of the treasurer's roll as it came into his hands the judgment of the court was that this tax was void for uncertainty; that there was nothing put into the assessor's roll to show the amount of values except the figures, which were not properly designated to show that they represented money and to show the amount of the taxes levied. Some effort was made about three years after the tax was said to have been levied, in the year 1887, by the officers of the county to correct the roll by making some additions to it, but it was found that he had no authority to do so. He might, perhaps, make a new assessment if he could have determined what property was subject to taxation in 1884, although it was a long time after that that he was seeking to do anything in the premises, but that he did not attempt to do. He thought he would make good the roll by the addition of matters in which it was deficient, and for that he had no authority, so that we feel compelled to regard his roll as having been void from the first and as conferring upon the county treasurer of the county no authority whatever to seize these cattle and compel Mr. Haley to pay the money."

IX. The court erred in charging the jury as follows:

"The question, then, for your consideration is whether
224 this sum was paid by this plaintiff, The Haley Live Stock Company, as it is called, or by Mr. Haley on his own account. It is true that in a certain sense it was paid by Mr. Haley—that is, he got the money through the aid and assistance of Mr. Aicher from the German National bank, and it is not plainly disclosed as to in what manner he was proceeding—that is, what was in his mind at the time he got this money; and the defendant alleges that the whole scheme of organizing this company and the making of this payment and all that has been done by the company was a mere pretence and sham and ought to be so regarded by the jury; that upon all that is disclosed by the testimony here you ought not to recognize this corporation as having any existence whatever; that it is a delusion and intended so to be, and that Mr. Haley's act in getting the money was a pretence only and should not be recognized and given any *for* force and validity whatever; that what was done with respect to getting this money and paying it over is to be taken by you that it was only Mr. Haley that did that, and that this company has no standing whatever. Now, this is a matter for your consideration,

whether you can say that under the circumstances disclosed to you that this was a payment by said plaintiff through Mr. Haley or was not his money and that it made this payment to the treasurer, or that it was made by Mr. Haley alone and that the company was not entitled to recognition as being the party which made the payment. In the consideration of that matter you can go upon all the evidence which has been put before you."

The court erred in that part of its charge last above quoted, in this: (1) it stated the theory of defendants, but did not inform the jury that if they found that theory to be true they should find a verdict for defendants, and virtually withdrew this entire theory from the consideration of the jury; and (2) it authorized a verdict for the plaintiff even though the jury may have believed that the pretended company was organized and owned by Haley and the property fraudulently transferred to it for the sole purpose of bringing this action in the Federal court.

X. The court erred in charging the jury as follows:

"It was alleged that the company afterwards paid the money into the German National bank. I have not much to say about that. Counsel have commented upon this case with some bitterness and have shown a good deal of feeling about it. This litigation, it appears, has been in the courts of the State and has been somewhat protracted, and they have got into a good deal more temper and passion about it than they ought to have. I do not see that there is anything extraordinary in this whole business or anything about which we should show so much temper. We ought to determine these things dispassionately and without considering anything whatever as to matters of prejudice and feeling."

225 XI. The court erred in charging the jury as follows:

"I think, gentlemen, I can say to you if you believe from the evidence that this money was paid over by the Haley Live Stock Company and not by Mr. Haley himself, that then the plaintiff would have the right to recover it back as having been exacted under circumstances which showed no authority on the part of Mr. Wilson to get it."

XII. The court erred in overruling defendants' motion for a new trial.

H. B. JOHNSON AND
DAN'L E. PARKS,
Attorneys for Plaintiff in Error.

(Indorsed:) 2340. Haley Live Stock Company *vs.* S. D. Wilson, treasurer, etc. Assignment of errors. Filed Aug. 23, 1890. William A. Willard, clerk.

And afterwards and on, to wit, the 11th day of October, A. D. 1890, at chambers, before the Honorable Moses Hallett, district judge, the following further proceeding was had and entered of record in said court and in — cause, to wit:

Order to Attach Amendments to Bill of Exceptions.

THE HALEY LIVE STOCK COMPANY
vs.
SAMUEL D. WILSON *et al.*
} 2340. Action for Damages.

On reading the annexed proposed amendments to the bill of exceptions of the defendant S. D. Wilson in the above-entitled cause and the stipulation thereto of W. T. Hughes, attorney for said plaintiff, consenting thereto, and upon consideration thereof it is ordered that the said proposed amendments be, and the same are hereby, allowed, and the clerk of said court is hereby directed to insert the said amendments in the original bill of exceptions immediately following the recital of the charge of the court to the jury therein.

226 *Clerk's Certificate.*

UNITED STATES OF AMERICA,
District of Colorado,
} ss:

I, William A. Willard, clerk of the circuit court of the United States for the district of Colorado, do hereby certify the above and foregoing to be a true, perfect, and complete transcript and copy of the record and proceedings heretofore filed or had and entered of record in said court and in a certain cause lately in said court pending, wherein The Haley Live Stock Company was plaintiff and Samuel D. Wilson, treasurer of Routt county, Colorado, and others were defendants, as fully and completely as the same still remain on file or of record in my office.

In testimony to the above I do hereunto sign my name and affix the seal of said court, at Denver, in said district, this 11th day of October, A. D. 1890.

[Seal United States Circuit Court, District of Colorado.]

WILLIAM A. WILLARD, *Clerk*,
By F. W. TUPPER, *Deputy Clerk.*

Endorsed on cover: Case No. 14,384. Colorado C. C. U. S. No. 588. S. D. Wilson, treasurer of Routt county, plaintiff in error, *vs.* The Haley Live Stock Company. Filed October 27, 1890.

332

332

FE
JAMES H. McKENNEY
CLE

IN

The Supreme Court

OF

THE UNITED STATES.

S. D. WILSON, TREASURER, ETC.,
Plaintiff in Error,
vs.
THE HALEY LIVE STOCK COMPANY,
Defendant in Error.

No. 14384.

BRIEF OF PLAINTIFF IN ERROR.

DANIEL E. PARKS,
H. B. JOHNSON,
Attorneys for Plaintiff in Error.

A. J. LUDDITT, LAW PRINTER, 1409 AND 1411 LAWRENCE ST., DENVER, COLO.

IN

The Supreme Court

OF

THE UNITED STATES.

S. D. WILSON, TREASURER, ETC.,
Plaintiff in Error,
vs.
THE HALEY LIVE STOCK COMPANY,
Defendant in Error.

No. 14384.

STATEMENT OF THE CASE.

This was an action for damages alleged to have resulted from the seizure of certain cattle on July 27, 1888. Wilson, who made the seizure in his official capacity as County Treasurer, denied that The Haley Live Stock Company ever owned the cattle or had paid anything to release them, and alleged that the cattle were the property of one Ora Haley, and that they were seized under a tax warrant for a tax levied on said cattle, and due from the said Ora Haley for the year 1884.

The cause was tried before a jury, and resulted in a verdict and judgment for $5,266.92.

The pretended articles of association of this pretended corporation plaintiff were filed for record in the County Recorder's office in Iowa on July 24th, in Wyoming on July 30th, and in Colorado on August 10, 1888. (Record, page 13.) But they were not filed in the office of the Secretary of State in Iowa until August 29, 1888 (Id., 14), and they were never filed in the office of the Secretary of State of Colorado.

The cattle were seized on July 27th, and released on August 21st, by Ora Haley paying the claim of the county. (Id., 14 and 15.) The verdict was for the amount that went into the county treasury. The balance covered by the receipt was State taxes.

The testimony of Haley was to the effect that *he*, and not The Haley Live Stock Company, paid these taxes (Id., 32); that he organized the company with a capital stock of 3,000 shares, of which he owned 2,990, and the other ten shares were distributed between Kinney, Hughes, Hass and Tourtelotte, and the consideration for the cattle was the capital stock of the company (Id., 33 and 34); that subsequent to this seizure one Timothy Kinney had brought an injunction suit to restrain the sale of these cattle for the tax, and under the seizure in question, claiming the property under a sale by Haley to himself, and that upon the hearing, about the middle of August, 1888, of a motion to dissolve this injunction, Haley and Kinney had both testified that these cattle belonged to Kinney (Id., 36); that these cattle were transferred to the company for the purpose of litigating in the Federal Courts and thus avoiding the adjudications of the Supreme Court of Colorado (Id., 37); affidavit of Haley that these cattle were the property of Kinney on August 4, 1888 (Id., 39); that he

was advised by Mr. Hughes—his attorney—to transfer this property to Kinney, and from him to a corporation (Id., 40); that The Haley Live Stock Company had not acquired title to the property on July 27, 1888—the day of the seizure of the cattle (Id., 55); that there had been no delivery of the property to the said company on July 27, 1888 (Id., 56); that there was a lien on this property for these taxes (Id., 59); that he was the President, Treasurer, Director, and General Manager of the company (Id., 62); that about 1885 he obtained an injunction against the collection of this tax, which was dissolved; that he then obtained a second injunction, which was dissolved by the Supreme Court, and the suit was dismissed (Breeze vs. Haley, 10 Colo., 5); that he then obtained a third injunction, which was again dissolved, and the suit dismissed by the Supreme Court (Breeze vs. Haley, 11 Colo., 351); that he thereafter obtained a fourth and a fifth injunction, both of which were dissolved by the District Court of Arapahoe County, Colorado; that he took one of these cases to the Supreme Court of the United States (Haley vs. Breeze, 144 U. S., 130), and that on all these injunctions, except the last, the cattle were released. (Id., 64 and 65.)

The testimony of Wilson Rankin (a witness for plaintiff) was to the effect that he was in charge of the cattle at the time they were seized by the Treasurer of Routt County for taxes; that the cattle were released by his delivering a check for $12,500; that at the time he delivered the check he demanded a receipt in the name of The Haley Live Stock Company, which was refused, and a receipt was taken in the name of Haley (Id., 66 and 67); that at the time of the seizure he was holding the cattle for Kinney, and knew nothing, at that

time, about The Haley Live Stock Company (Id., 70); that he got the check from Haley, and the first time he ever mentioned the name of the company or knew of any such company was when he demanded a receipt in the name of the company. (Id., 71.)

Mr. Tourtelotte testified that since 1866 there had been talk of organizing a corporation, with Haley, Kinney and Hass as incorporators. (Id., 72.)

Then follows, in the record, testimony of Nuckolls, Green, Mathews, Aicher and Wilson, respecting the probable damage resulting from the seizure and detention of the cattle, all of which was subsequently excluded by the Court. (Id., 74–84.)

Then follows the testimony of McKay and Kittell, tending to connect parties other than plaintiff in error with this seizure, but, by the dismissal of these parties, this testimony becomes immaterial. (Id., 85–87.)

Then follows the testimony of Mr. Coulter, which consists chiefly of comments upon records, alteration of records, injunction proceedings, etc., all of which will fully appear by the records themselves. (Id., 88–99.)

Plaintiff then introduced a certified copy of the assessment roll (Id., 100) and then closed his case. (Id., 101.)

The defendants moved the Court to direct a verdict for them, on the evidence of plaintiff, upon four distinct grounds. (Id., 102). The Court overruled this motion for reasons stated. (Id., 103 and 104.) This ruling and decision furnish the foundation for the third, fourth, fifth and sixth assignments of error.

The plaintiff in error identified the Treasurer's roll under which he made the seizure, and testified that the upper row of figures were in pencil and were placed on the roll to show the terms of a proposed compromise (Id., 104–106); that the only other change ever made to the roll was the addition of the dollar mark (Id., 106); that after the dissolution of the last injunction, in the latter part of August, 1888, he arranged with Haley to pay his taxes, and The Haley Live Stock Company was not mentioned; that he never heard of this company until the day the taxes were paid and the cattle released, which was August 21, 1888. (Id., 107.)

The defendants then introduced a certified copy of the tax schedule made by the Assessor. (Id., 111–120.) Also two letters from Haley. (Id., 120 and 121.)

The defendants offered the records of the Supreme Court in Breeze vs. Haley (10 Colo., 5) and Breeze vs. Haley (11 Colo., 351), which were excluded, and to which ruling exception was taken. (Id., 122–124.) This ruling is assigned for error by the first assignment.

Mr. Iles testified that the bill of sale from Haley to Kinney was dated June 15, 1888, which was the very day the Supreme Court rendered its last decision (Id., 125); that the last injunctions were dissolved August 16, 1888, and that, after this, he talked with Haley about his settling his taxes, at which time he had never heard the name of the company mentioned. (Id.)

L. H. Breeze testified that he was the Treasurer prior to the term of Wilson; that the only changes that had ever been made on the records relating to these taxes was to add the dollar mark and the pencil marks to show proposed compromise; that he added the dollar mark by virtue of the statute,

and under the advice of the County Attorney and others. (Id., 126–128.)

John M. Breeze testified that the Treasurer's books were originally printed without any mark to indicate dollars and cents; that the original schedule of Haley's assessment did have these marks, and he advised the Treasurer to amend his books to conform therewith (Id., 131, 132); that he was present at a trial of a motion to dissolve an injunction in August, 1888, and never heard of The Haley Live Stock Company until he was in the act of drawing the receipt for the taxes (Id., 133); that the cattle were the same as those upon which the assessment was made. (Id.)

L. H. Breeze, recalled, testified that the check given in payment of these taxes was drawn by Aicher, payable to Haley and endorsed by Haley, and that the name of the company did not appear thereon. (Id., 135.)

Ora Haley, recalled, testified that he used the certified check of Aicher to pay the taxes; that he got the check by giving his own note; that the company had no property, money or bank account at the time. (Id., 136–139.)

Aicher testified that he gave a check to be used by Haley in paying these taxes, and that the name of The Haley Live Stock Company was not used in getting the money. (Id., 140, 141.)

The defendants moved the Court to instruct the jury as follows:

1. If the jury believe from the evidence that the taxes in question were paid by Ora Haley and not by The Haley Live Stock Company, their verdict will he for the defendants in both of the causes now submitted to the jury, and it is wholly immaterial as to whether The Haley Live Stock

Company at any subsequent time reimbursed the said Haley for the money so paid.

2. If the jury believe from the evidence that Ora Haley executed his individual note and obtained a check payable personally to himself and endorsed that check in his individual name and with that check paid the taxes in question, then this was his individual act, and no mere intention upon his part to recognize and ratify such act upon the part of the company would operate to make the antecedent payment the act of the company.

3. If the jury believe from the evidence that The Haley Live Stock Company had not become the owner of the property in question on the 21st day of August, at the time the taxes in question were paid, then the payment, even if made by The Haley Live Stock Company, was a voluntary payment and cannot be recovered back.

4. If the jury believe from the evidence that Ora Haley has willfully testified falsely as to any material fact connected with the issues of this cause, then they are authorized to disregard any or all of the testimony of said witness, and it is their duty to so disregard it unless they find that it is corroborated or that it is reasonably consistent in itself.

5. If the jury believe, from the evidence, that the property in question was conveyed to The Haley Live Stock Company for the sole purpose of bringing this action, and not for any *bona fide* purpose of vesting the title for all purposes in such company, then they will find for the defendants in both of of said causes. (Id., 142 and 143).

The Court refused all these instructions, to which ruling exception was taken (Id., 143), and this is assigned for error by the second assignment.

The Court instructed the jury that they could find against no one but Wilson, and that, as The Haley Live Stock Company was not the owner of the cattle at the time of the seizure, no recovery for damages resulting from such seizure could be had. (Id., 143 and 144.)

The seventh assignment of error is based upon the part of the charge of the Court to the jury which is as follows:

"The testimony shows that this payment was made under protest, or, as we say, by compulsion, in order to get possession of the cattle and to prevent them from being sold to satisfy the tax, and, under such circumstances, when a payment is made in that way, the person making it, whether he be the person against whom the tax is levied or a stranger acting for that person, he, if the tax is seen to be irregular and void, may recover his money." (Id., 162.)

The eighth assignment of error is based upon the part of the charge of the Court to the jury which is as follows:

"And when the evidence was all received as to the nature of the assessment roll that was out, and of the Treasurer's roll as it came into his hands, the judgment of the Court was that this tax was void for uncertainty; that there was nothing put into the Assessor's roll to show the amount of values except the figures, which were not properly designated to show that they represented money and to show the amount of the taxes levied. Some effort was made about three years after the tax was said to have been levied—in the year 1887—by the officers of the county, to correct the roll by making some additions to it, but it was found that he had no authority to do so. He might, perhaps, make a new assessment if he could have determined what

property was subject to taxation in 1884, although it was a long time after that that he was seeking to do anything in the premises, but that he did not attempt to do. He thought he would make good the roll by the addition of matters in which it was deficient, and for that he had no authority, so that we feel compelled to regard his roll as having been void from the first and as conferring upon the County Treasurer of the county no authority whatever to seize the cattle and compel Mr. Haley to pay the money." (Id., 162.)

The ninth assignment of error is based upon the part of the charge of the Court to the jury which is as follows:

"The question, then, for your consideration is whether this sum was paid by this plaintiff, The Haley Live Stock Company, as it is called, or by Mr. Haley, on his own account. It is true that in a certain sense it was paid by Mr. Haley — that is, he got the money, through the aid and assistance of Mr. Aicher, from the German National Bank, and it is not plainly disclosed as to in what manner he was proceeding—that is, what was in his mind at the time he got this money—and the defendant alleges that the whole scheme of organizing this company and the making of this payment and all that has been done by the company was a mere pretense and sham, and ought to be so regarded by the jury; that upon all that is disclosed by the testimony here, you ought not to recognize this corporation as having any existence whatever; that it is a delusion, and intended so to be, and that Mr. Haley's act in getting the money was a pretense only, and should not be recognized and given any force and validity whatever; that what was done with respect to getting this money and paying it over is to be taken by you that it was only Mr.

Haley that did that, and that this company has no standing whatever. Now, this is a matter for your consideration, whether you say that under the circumstances disclosed to you, that this was a payment by said plaintiff, through Mr. Haley, or was not his money, and that it made this payment to the Treasurer, or that it was made by Mr. Haley alone, and that the company was not entitled to recognition as being the party which made the payment. In the consideration of that matter, you can go upon all the evidence which has been put before you." (Id., 162.)

The tenth assignment of error is based upon the part of the charge of the Court to the jury which is as follows:

"It was alleged that the company afterwards paid the money into the German National Bank. I have not much to say about that. Counsel have commented upon this case with some bitterness, and have shown a good deal of feeling about it. This litigation, it appears, has been in the Courts of the State and has been somewhat protracted, and they have got into a good deal more temper and passion about it than they ought to have. I do not see that there is anything extraordinary in this whole business, or anything about which we should show so much temper. We ought to determine these things dispassionately and without considering anything whatever as to matters of prejudice and feeling." (Id., 163.)

The eleventh assignment of error is based upon the part of the charge of the Court to the jury which is as follows:

"I think, gentlemen, I can say to you, if you believe from the evidence that this money was paid over by The Haley Live Stock Company and not by Mr. Haley himself, that then the plaintiff would

have the right to recover it back as having been exacted under circumstances which showed no authority on the part of Mr. Wilson to get it." (Id., 163.)

Certain statutes in force at the time, and which affect the powers, duties and liabilities of the County Treasurer, are as follows:

An entry shall be made upon the tax list showing what it is and for what county and year it is, and the County Clerk shall attach to the list his warrant, under his hand and official seal, in general terms, requiring the Treasurer to collect the taxes therein levied according to law; and no informality in complying with the above requirements shall render any proceedings for the collection of taxes illegal. The Clerk shall cause the list to be delivered to the Treasurer of the county by the 1st day of November, or as soon thereafter as practicable, and shall take his receipt therefor; and such list shall be full and sufficient authority for the Treasurer to collect all taxes contained therein. (General Statutes, 1883, page 837, Section 2866.)

The Treasurer, on receiving the tax list and warrant, shall proceed to collect the tax therein levied, and the list and warrant shall be his authority and justification against any illegality in the proceedings prior to receiving the list. (Id., page 840, Section 2882.)

Omissions, errors or defects in form in any assessment list or tax roll, when it can be ascertained therefrom what was intended, may be supplied or corrected by the Assessor at any time before the return of the assessment roll to the Treasurer, or by the Treasurer at any time after the receipt of the said roll by him. (Id., page 854, Section 2926.)

Any officer who shall willfully neglect or refuse to perform any of the duties imposed on him by this act shall be deemed guilty of a misdemeanor, and on conviction shall be punished by fine and imprisonment, the fine not to exceed one thousand dollars, nor the imprisonment one year. (Id., page 866, Section 2949.)

It shall be the duty of every person owning or having charge of property in this State subject to taxation to make out and deliver to the Assessor, on or before the 20th day of May in each year, a correct list of the same as required by law, whether he shall receive from the Assessor a notice to do so or not; and every assessment made against property subject to taxation shall be valid in all respects, whether such notice was received or not; and no failure of the owner to have such property assessed or to have the errors in the assessment corrected, and no irregularity, error or omissions in the assessment of any property, or in the levying of any tax, shall affect in any manner the legality of any taxes levied thereon. (Id., page 826, Section 2837.)

All taxes levied or assessed upon personal property of any kind whatsoever shall be and remain a *perpetual lien* upon the property so levied upon until the whole amount of such tax is paid; and if such tax shall not be paid on or before the 1st day of January next succeeding such levy, it is hereby made the duty of the County Treasurer to collect the same by distress and sale of any of the personal property so taxed, or of any other personal property of the person assessed. (Id., page 822, Section 2819.)

In all cases where any person shall pay any tax, interest or costs, or any portion thereof, that shall thereafter be found to be erroneous or illegal,

whether the same be owing to erroneous or improper assessment, to improper or irregular levying of the tax, to clerical or other errors or irregularities, the Board of County Commissioners shall refund the same without abatement or discount to the taxpayer. (Id., page 823, Section 2825.)

If by any means any property, real or personal, shall be omitted in the assessment of any year or series of years, and not put upon the Assessor's book, the same, when discovered, shall be assessed by the Assessor for the time being, * * * or in case of the failure or neglect of the Assessor, *the same shall be assessed by the Treasurer* as provided for additional assessments. (Id., page 832, Section 2857.)

BRIEF OF PLAINTIFF IN ERROR.

I.

The evidence showed that the question of the validity of this tax had twice been before the Supreme Court of Colorado in the cases of Breeze vs. Haley (10 Colo., 5) and Breeze vs. Haley (11 Colo., 351). The defendant offered the entire records of these cases in evidence to show that he proceeded to collect the tax in question under and by virtue of the adjudications of the Supreme Court, and also for the purpose of showing that Mr. Haley knew and set forth in his complaints the exact amount of taxes due. These records were excluded on the ground that there had been no plea of *res adjudicata*. These records are not incorporated in the bill of exceptions, but the issues and questions decided sufficiently appear by the adjudications, and of these this Court will take judicial notice—at least, for the purpose of determining whether the records in those causes

should have been admitted in evidence. These records should have been admitted under the pleadings as they stood, and without any special plea of *res adjudicata*. (Campbell vs. Rankin, 99 U. S., 261; Insurance Company, etc., vs. Harris, 97 U. S., 331.) The Court excluded these records, not upon any ground that the questions involved here had not been decided, but upon the sole ground that the former adjudication had not been pleaded.

If this tax was, for any reason, void, this was a ground for an injunction, and the adjudication in Breeze vs. Haley (10 Colo., 5) was conclusive, not only as to all matters actually litigated, but as to all such matters as might have been brought forward and litigated in that cause. (Breeze vs. Haley, 11 Colo., 351; Stark vs. Starr, 94 U. S., 477.) A cause of action cannot be split up and prosecuted in fragments. (Stark vs. Starr, 94 U. S., 477.)

The property, at the time of the pretended sale by Haley to The Haley Live Stock Company, was subject to a lien for these taxes (General Statutes, page 822, Section 2819), and the taxes had been adjudicated by the Supreme Court to be valid. It follows that the company held in privity with Haley and could not re-litigate any question as to the validity of such taxes. Even if the County of Routt could be held liable, these adjudications and the statutes set forth in the statement furnished a complete indemnity to the officer.

II.

At the close of the evidence of plaintiff, defendants moved the Court to instruct the jury to find for them. In overruling this motion, the Court declared the law as follows:

"The motion is presented to the Court to instruct the jury to find for defendant in the two cases on trial. Some of the questions are very perplexing. I have no difficulty as to the matter of ownership and possession of this property at the time of the seizure, on July 27, 1888. It is very clear that the plaintiff had not acquired the title or possession at that time, and, as trespass cannot be maintained without ownership on the part of the plaintiff, or, at least, the possession of the property, the actions cannot be maintained as to the seizure of the cattle and the loss accruing to the plaintiff from that act. The remaining question under these complaints is that the plaintiff may maintain an action for the money paid to procure a release of the cattle. The evidence so far tends to prove that this was paid by the plaintiff in the suit, and if it be assumed that the plaintiff was paying it for Kinney or whoever was the owner of the cattle at that time, to secure the release of them with a view of holding them and acquiring property in them, I see no serious objection to the proposition that the action may be maintained by the plaintiff to recover this money. The circumstance that the plaintiff was a stranger to the proceedings to collect the tax—that is, the tax was not levied against it, not recoverable against it—is not material, as it seems to me. If the tax is void—one which could not be collected against or from the person upon whom it was levied—a stranger paying the amount for the

use of that person, or in any way whatever, ought to be able to recover his money. The difficulty arises as to the form of the complaint in each case. It is unquestionably an action for property and injury to property, and the mention about the tax and the payment of it is incidental to that, and it is carrying the doctrine of construction as to liberality allowed in pleading to a great length to say that under such form of complaint the action may be maintained for money without reference to the cause of action stated. But it is nevertheless true that it is stated in each complaint that the sum of money was exacted for releasing the stock from the levy, and in each case there is a prayer for judgment for this amount—$12,742.52 and interest. Under the present impression I have, I think the action may perhaps be allowed to stand for that sum, denying to the plaintiff the right to recover for the cattle or the injury to them, as matters occurring before it acquired title to the property or possession of that property. In so far as it is alleged that this company was organized with a view to maintain a suit in this Court on matters which had previously arisen between the plaintiff or Mr. Haley and the defendant, I have no doubt that the evidence establishes the fact that the company was so organized. My understanding is that it does not defeat the suit itself, provided that the plaintiff has a cause of action for the money which was paid to secure the possession of this property. In other words, if the jury should be satisfied that the money was paid by the plaintiff, and should also be satisfied that the tax was void and one that could not be collected, the circumstance that the company was organized with the direct purpose on the part of those organizing it to maintain a suit in this Court does not defeat

the action. The cases cited by counsel are cases in which the bonds and other instruments upon which suit was founded were assigned by the owners of them to the plaintiff merely to bring suit upon them. By the assignment the plaintiff acquired no interest in the choses in the action, and in that case, where one individual assigns to another an instrument or other cause of action with the intent that the other shall bring a suit upon it and the proceeds be turned over to the assignor whenever they shall be collected, there is no question whatever of the fact that the assignment is collusive and made for the purpose of maintaining the action in the Federal Court. But that is not this case, if it be assumed that the plaintiff paid the money for getting possession of these cattle, and that the money belonged to it, and that the tax was one which could not be collected. The motion for direction to the jury will be denied for the reasons which I have stated." (Record, pages 103 and 104.)

The above decision furnishes the foundation for the third, fourth, fifth and sixth assignments of error.

The Court decides—and subsequently instructed the jury—that the plaintiff did not *own* or *have possession* of the property at the time of the seizure, but that it could come forward and voluntarily pay the taxes of another person in order to release his property, and, in the event the tax was illegal, have an action for the recovery of the money paid. This payment of Haley's taxes, even if made by the company, would not give a cause of action, even against Haley. (McGee vs. San Jose, 68 Cal., 91; Brown vs. Chesterville, 63 Me., 241; Wilkes vs. Harper, 1 N. Y., 586; 18 Amer. and Eng. Ency. Law, page

187, and cases cited.) And, as this money was paid voluntarily, it cannot be recovered back. (18 Amer. and Eng. Ency. Law, page 215, and cases cited.) The seizure of Haley's property did not compel this pretended company, which had no title to or possession of the property, to pay the taxes, and, in the absence of compulsion, a payment under *protest* is, nevertheless, a *voluntary payment*. (Lamborn vs. Commissioners, 97 U. S., 181; Union Pacific, etc., vs. Dodge County Commissioners, 98 U. S., 541.) But there was no allegation in the complaint that the payment was made under protest.

In an action to recover back taxes that have been paid, the only questions are as to whether there was property subject to taxation and the tax was collected for a lawful purpose. Mere irregularities in procedure give no cause of action. (Cooley on Taxation, 808; Hanson vs. Haverhill, 60 N. H., 218; Bailey vs. Railroad Co., 22 Wall., 604.)

The Court, in overruling this motion and allowing a recovery by plaintiff, permitted a *substantial variance* from the pleadings. The complaint was based upon the theory that the plaintiff was the owner and in possession of the cattle at the time of the seizure; that they were taken from the possession of plaintiff by a trespass; that plaintiff was damaged, and the amount paid to regain possession was alleged as one item of damage merely. There was no allegation that plaintiff made a payment for Haley or that any payment was made under protest. One cause of action was alleged and another was recovered upon. This was objected to in apt time. The variance was material. The vital issue made by the pleadings was in regard to the ownership and

possession of the property. Defendants, having won upon that issue, could not be required to proceed to the trial of a cause materially different from the one alleged. (1 Estee's Pl., 3d Ed., Section 205.)

The Court, in overruling this motion, held that this pretended company was organized *for the purpose of bringing this suit in the United States Courts.* Upon this view we challenged and we still challenge the jurisdiction of the trial Court. The testimony all showed that this alleged corporation was organized by Haley with the view of perpetrating a fraud upon the jurisdiction of the Federal Courts. If the corporation was ever organized, Haley owned it as absolutely as he owned the property in question. He owned 2,990 shares of its stock. The other ten shares were distributed among his friends, to the end that there might be enough persons to organize with. Not one dollar ever went into any supposed treasury. Haley filled every office which a corporation has. He simply transacted his business under an *alias.* When these cattle were released, he shipped them to Chicago, sold them and remitted the money to replace that which he had borrowed to effect the release. It is said that in remitting this money he used, in some way, the name of the company, but this was the first and only time he ever used it. But this payment, though disguised under the name of the company, was the individual act of Haley. In view of these considerations, it was the duty of the lower Court to deny its jurisdiction, and it is the duty of this Court to do so. (Nashua Railroad vs. Lowell Railroad, 136 U. S., 356.)

III.

The five instructions asked by defendant and refused by the Court should have been given. The first instruction was to the effect that if the jury believed that these taxes were paid by Haley and not by the company, they should find for the defendant. It may be that this question was submitted, though not very intelligently, to the jury. But this instruction contained a further proposition. It told the jury that if they believed that the payment was made by Haley, then it was wholly immaterial whether the company *at any subsequent time reimbursed the said Haley for the money so paid.* It was vitally important that the jury should be instructed upon this point. The evidence clearly showed that Haley alone and in his own name furnished the money with which his taxes were paid. The only testimony that connected the company was that of Aicher (Record, pages 141 and 142), and he said that about two weeks after the taxes were paid, and after the cattle were sold in Chicago, Haley sent him a draft, drawn by some bank in Chicago, payable to the order of the company, and endorsed over by Haley, as manager of the company. This money came from the sale of the cattle, and the Court had already held that the company did not own the cattle. This draft could have been drawn in this way by Haley without the knowledge of any supposed company and without there being any such company in existence. The Court was merely asked, however, to tell the jury that a reimbursement of Haley would not amount to an original payment *under coercion.* Instead of this instruction, the Court charged: "It was alleged that the company afterwards paid the money into

the German National Bank. I have not much to say about that." This was all it did say on the subject, and this amounted *to saying nothing.* The effect was to allow the jury to infer that this leger-demain of Haley's in sending a draft payable to the order of the company and indorsed by himself, by which he transmitted his own money to take up a loan he had personally made, amounted not only to an original payment by the company, but an original payment under protest and compulsion.

The second instruction was to the effect that if Haley paid these taxes individually, "*no mere intention upon his part to recognize and ratify such act upon the part of the company would operate to make the antecedent payment the act of the company.*" Haley was the company. He could do with it—and in its name—as he pleased. He furnished the money with which his own taxes were paid. At the time he furnished it, the most that he could have intended was to transfer his herd of cattle to a foreign corporation *in exchange for the stock of the corporation,* and then, when some of the cattle were sold, to try to make it appear that the company repaid the money, and thus deduce the inference that the company originally paid these taxes to secure a release of the cattle. No jury could ever be imposed upon by so transparent a fraud as this if it had received any fair or intelligible instructions from the Court.

By the third instruction the Court was asked to inform the jury that if the company, at the time the taxes were paid, had not become the owner of the property in question, then the payment was voluntary and could not be recovered back. All the evidence shows—and the Court expressly held—that Haley organized this company for

the purpose of bringing into existence a party in whose name he could litigate certain questions which had been decided against him by the Supreme Court of the State of Colorado. His scheme was to organize a corporation, transfer his property thereto, issue all the stock to himself in payment for the property, and then, out of 3,000 shares of stock, place ten shares in the hands of his friends and his attorney of record in this cause, and thereby avoid the decisions of the State Courts. We shall see, in another connection, that this scheme could only be carried out—and was attempted to be carried out—by perjury and subornation of perjury of the most flagrant and infamous character. While this scheme was being executed, and before the company had acquired any *legal status;* and before it had acquired any *nominal title, even,* to the property, this seizure took place and these taxes were paid. And the Court, by the refusal of this instruction, as well as in other forms, held that a payment by the company, without any ownership in the property at the time of the payment, was not a *voluntary payment.*

The fourth instruction was in relation to the effect that willful perjury, on the part of Haley, should have upon his testimony. The entire record shows such fraud and willful perjury on the part of Haley as would render his testimony wholly unworthy of belief. The record shows that Haley procured, *ex parte,* an injunction against the collection of this tax, under which his property was released. This injunction was dissolved and another seizure was made. He then went to another District Judge and procured a second injunction, *ex parte* and *mandatory in form,* under which his property was again re-

leased. This injunction was dissolved by the Supreme Court and the cause dismissed. (Breeze vs. Haley, 10 Colo., 5.) Another seizure being made, he went to still another District Judge and, *ex parte*, procured a third injunction, *mandatory in form*, under which his property was released, which was again dissolved and the suit dismissed. (Breeze vs. Haley, 11 Colo., 351.) In this last case the Court held that its first decision was *res judicata* of the validity of these taxes, and closes an opinion on rehearing by saying: "The whole proceeding in this case appears to us to be an unwarranted attempt to have matters re-adjudicated which have already been decided against the plaintiff, and to further harass the authorities of the county. and delay the collection of its revenue." This last decision was rendered on June 15, 1888. On this day Haley made out a *false and fraudulent* bill of sale of all his personal property to one Kinney. The consideration was $300,000. Kinney executed to Haley three notes of $100,000 each, secured by chattel mortgage on the same property. This chattel mortgage was never recorded, and there was never any delivery of possession to Kinney. Thereupon Haley, using the name of Kinney, obtained *ex parte* two more *mandatory injunctions*—one against Breeze, the old Treasurer, and another against Wilson, his successor—and caused to be instituted, also in the name of Kinney, an action of replevin. In these suits Haley made affidavits that Kinney was, at the time such suits were brought, the owner and in the possession of this property. Wilson refused to release the property under these injunctions, and claimed the right to give bond and hold the property as against the writ of replevin. On August 16, 1888, these injunctions were dissolved.

On this hearing, Haley testified that this sale to Kinney was *bona fide*, and that Kinney was the owner of the property. Thereafter and on this last mentioned day, Haley attempted to procure an injunction from the United States Court upon the theory that this company was the owner of the property. These facts were all before the jury, and an instruction as to the effect of *willful perjury* upon the question of the weight that should be given to the testimony of the guilty witness was *imperatively demanded* by the circumstances.

The fifth instruction was to the effect that if the jury believed from the evidence that the property in question was conveyed to the company "*for the sole purpose of bringing this action, and not for any bona fide purpose of vesting the title for all purposes in such company*," then they would find for defendant. The company could have no intention or will other than that of Haley. He made it and could unmake it. He could at any time require the company to reconvey the property to himself. If his sole purpose in organizing the company and conveying this property to it was to merely hold it for the purpose of this suit and for his benefit, then the case is not distinguishable from any other case where property is conveyed to an individual for the purpose of litigation in the Federal Courts for the benefit of a party not entitled to invoke their jurisdiction. This instruction was correct and should have been given. (Lanier vs. Nash, 121 U. S., 404; Morris vs. Gilmer, 129 U. S., 315; Little vs. Giles, 118 U. S., 596; Barry vs. Edmunds, 116 U. S., 550; Farmington vs. Pillsbury, 114 U. S., 138; Cashman vs. Amador, etc., 118 U. S., 58; New Providence vs. Halsey, 117 U. S., 336.) A conveyance to a corporation of all the

property it has, in exchange for the entire stock of the concern, is without consideration. The stock represents the property, and it is a mere change of the nature of the title. Where this change of title is made for the sole purpose of enabling the real owner to litigate in the Federal Courts, it will not sustain jurisdiction. (Hancock vs. Hillegas, 2 Dall., 380; Maxfield vs. Levy, 4 Dall., 330; Jones vs. League, 18 How., 76; Mansfield, etc., vs. Swan, 111 U. S., 379; King Bridge Co. vs. Otoe County, 120 U. S., 225; Grace vs. American, etc., 109 U. S., 278; Blacklock vs. Small, 127 U. S., 96; Williams vs. Nottawa, 104 U. S., 209; Metcalf vs. Watertown, 128 U. S., 586.)

IV.

The question presented by the seventh assignment of error has been already discussed. The eighth assignment is based upon that part of the charge in which the tax proceedings are declared to be void, and the tax warrant held to be no protection to the officer. It is first declared that the original Treasurer's roll was void for want of the dollar mark. This was error. (State vs. Eureka, etc., 8 Nev., 15; Chickering vs. Faile, 38 Ill., 342; Elston vs. Kennicott, 46 Ill., 187; Jenkins vs. McTigue, 22 Fed. Rep., 148; Chamberlain vs. Taylor, 36 Hun, 24; Sawyer vs. Gleason, 59 N. H., 140; American Tool Co. vs. Smith, 14 Abb. N. C., 378, affirmed in 96 N. Y., 670; Cahoon vs. Coe, 52 N. H., 518, 524; Collins vs. Welch, 38 Minn., 62; Eppinger vs. Kirby, 23 Ill., 521; same case, 76 Amer. Dec., 709; Ensign vs. Barse, 107 N. Y., 329; City of Spokane Falls vs. Browne, 3 Wash., 84; New Orleans vs. Day, 29 La. Ann., 416; Ward vs. Board, etc. (Mont., 1892), 29 Pac. Rep., 658; Hopkins vs. Young, 15 R. I., 48.) The omission of the

dollar mark is at most a mere irregularity, error or omission which is cured by our statute. (General Statutes 1883, page 826, Section 26.) Curative statutes of this kind are valid. (Bush vs. People, 78 Ill., 566; Thatcher vs. People, 79 Ill., 606; Beers vs. People, 83 Ill., 493; Fisher vs. People, 84 Ill., 496; Lyle vs. Jaques, 101 Ill., 644.)

But the dollar mark was not entirely omitted from these tax proceedings. In the original tax schedule, which is the paper from which all the other rolls and warrants are made, the dollar mark everywhere clearly appeared. (Record, pages 116–119.) The tax warrant, as it came into the hands of the officer, also showed the dollar mark, but it is conceded that this had been added by the former Treasurer of the county, by way of amendment, to the original books from which the warrant was issued. The Court below held that this amendment was made without authority. This ruling was in violation of the plain letter of the statute. (General Statutes 1883, page 854, Section 2926.) The assessment list and tax roll are two documents, lodged in the same office and existing for the same purpose. It could be plainly seen from the assessment list, which contained the dollar mark, precisely what the figures representing valuations in the tax roll actually meant. The Treasurer, therefore, had the right, under the statute, to amend the tax roll by reference to, and to make it correspond with, the assessment list. But the tax roll itself, and without reference to the assessment list, clearly showed what was intended. An examination of this roll will show that no person could have any doubt as to what was intended. In every instance property is valued in dollars, and not in dollars and cents; 960 acres of land are valued at 2880; 165 horses at 6845; 2

mules at 100; 8,200 cattle at 163,000; 3 carriages at 200; and capital invested in merchandise, 200, etc. Now, any person knows that these sums mean either dollars or dollars and cents. To suppose they mean dollars and cents would be to assess 960 acres of land upon a valuation of $28.80; 165 horses would be valued at $68.45—less than 50 cents each; two mules valued at $1—exactly 50 cents each; 3 carriages at $2—less than $1 each—and 8,200 cattle at $1,630—about 20 cents each. To say that an assessment roll is void for uncertainty as to which of these rates of valuation was intended would be an absurdity and would be a conclusion which would be against the authorities upon the subject. The amendment, then, was properly made. (County of San Luis Obispo vs. White, 41 Cal., 432.) But even if this amendment could not be sustained *as such*, it could be sustained as a *new assessment*. The statute (General Statutes 1883, page 832, Section 2857), under the circumstances, authorizes the Treasurer, who made this amendment, to make a new assessment. If a new assessment could be made by merely adding the dollar mark to the tax rolls, and this was done, then, if it was not a valid amendment, as an amendment merely, the presumption, in the absence of anything to the contrary, would be that a *new assessment had been made.*

V.

It may be claimed that the description of the land was too uncertain; *but no such question was passed upon by the trial Court.* Mr. Haley, instead of returning his property for taxation, in the form provided by law, wrote a letter to the County Commissioners in which he said, "In addition to my property of 1883, I have *three additional one-fourth*

sections of 480 acres." (Record, page 121.) In Cadwalader vs. Nash (73 Cal., 43) it is adjudged that "where an owner returns the property as a whole, he cannot be heard to complain that it has been improperly listed in that manner." It will be presumed, in the absence of any showing to the contrary, that Haley returned his other lands for 1883 by the *same general description.* (Dear vs. Varnum, 80 Cal., 86; Brewing Co. vs. Meriden, 48 Conn., 243; Ward vs. Board, etc. (Mont.), 29 Pac. Rep., 658.) But, even if it should be said that the tax upon the land was void, it would not follow that the tax on the personal property was also void. The Court charged the jury that the *entire tax was void*, and, therefore, if any part of it is sustainable, the judgment must be reversed. The valuation upon the real estate was $3,780, while the valuation upon personal property was $170,520. These valuations are *separate and distinct.* Where part of a tax is legal and part is illegal, the legal part will be sustained if the parts are capable of being distinguished. (O'Kane vs. Treat, 25 Ill., 557; Briscoe vs. Allison, 43 Ill., 291; State vs. Allen, 43 Ill., 456; Allen vs. Peoria, etc., 44 Ill., 85; People vs. Nicholas, 49 Ill., 517; Mix vs. People, 72 Ill., 241; Genther vs. Fuller, 36 Iowa, 604; Parker vs. Sexton, 29 Iowa, 421; Eldridge vs. Kuehl, 27 Iowa, 160; Corning Town Co. vs. Davis, 44 Iowa, 633; Sully vs. Kuehl, 30 Iowa, 275; Hurley vs. Powell, 31 Iowa, 64; Upton vs. Kennedy, 36 Mich., 215; Silsbee vs. Sheckle, 44 Mich., 561; Wilson vs. Seavey, 38 Vt., 221–230; 2 Desty on Taxation, 642.) And in an action to recover back a tax that has been paid upon the ground of illegality, where only a part of the tax is illegal, the recovery will be limited to the illegal part if capable of being distinguished. (2 Desty on Tax-

ation, 787; Torry vs. Millbury, 21 Pick., 64; Lincoln vs. Worcester, 8 Cush., 53; Stanley vs. Albany County, 121 U. S., 535.) But the recovery of such illegal part, even, must be had in such a case as this—where the officer has paid it over, against the county and not against the officer. The officer, unless he has the money still in his hands, is not liable, *even though he acted under process which was void.* (Mechem Pub. Off., Sec. 694; Dickens vs. Jones, 6 Yerg., 483; Crutchfield vs. Wood, 16 Ala., 702; Lewis Co. vs. Tate, 10 Mo., 650.) And where part of a tax is legal and part is illegal, there can be no payment *under protest* which will give any cause of action to recover back the illegal part, unless, at the time of payment and protest, there has been a *specification of the illegal items;* and there is no pretense that there was, in this case, any such specification. (2 Desty on Taxation, 798; De Fremery vs. Austin, 53 Cal., 380; Bank of Mendocino vs. Chalfant, 51 Cal., 369; Oliver vs. Lynn City, 130 Mass., 143; Conkling vs. Springfield, 19 Ill. App., 167.)

The Court, in this part of its charge, assumes that Wilson made amendment to the roll, but all the evidence in the case shows that Breeze, the former Treasurer, under the advice of the County Attorney, made the amendment. This was done several years before Wilson became the Treasurer. Mr. Wilson proceeded to execute this tax warrant precisely in the form in which it was delivered to him. It was regular upon its face. The statute (General Statutes 1883, Section 2865) provides the form of a tax list, which is to be certified by the County Clerk to the Treasurer, and that, "no informality in complying with the above requirements shall render any proceedings for the collection of taxes illegal," and "such list shall be a full

and sufficient authority for the Treasurer to collect all taxes contained therein" (Id., Section 2866), and the warrant attached thereto "shall be his *authority and justification* against any illegality in the proceedings prior to receiving the list" (Id., Section 2882). These statutes furnish a complete indemnity to the officer, even if he had known of the amendment made to the roll prior to its coming into his hands. (Mecham Pub. Off., Section 691, and cases cited.) And there is no evidence that he ever had such knowledge. But, even without such statutes, an action to recover taxes paid *under protest* will not lie against the officer who collected the same by virtue of a tax warrant, as such warrant has the *force and effect of a judgment.* (2 Desty on Taxation, 790 and 808; Mulford vs. Sutton, 79 N. C., 276; Dickens vs. Jones, 6 Yerg., 483; Crutchfield vs. Wood, 16 Ala., 702; Lewis Co. vs. Tate, 10 Mo., 650; Haffin vs. Mason, 15 Wall., 671; Mechem Pub. Off., Sec. 690, and cases cited; Erskine vs. Holmbach, 14 Wall., 613; Bailey vs. Railroad Co., 22 Wall., 604.) And where taxes are paid on property legally liable to taxation, the money cannot be recovered back merely because the assessment was informal or irregular, and not in conformity to the statute. (Stephenson County Supervisors vs. Manny, 56 Ill., 160.) To entitle a party to recover, the tax must have been *absolutely void.* (Richardson vs. City of Denver, 17 Colo., 398.) We have seen that the only objection to this tax is the want of the dollar mark on the tax books, resulting from an error in printing them. But this did not render the tax void. The assessment was regular. The dollar mark appeared in all proper places on the assessment list to show the true valuations. There has been no pretense that Mr. Haley did not pay his taxes.

because of any doubt as to the amount of the assessment. In Jenkins vs. McTigue (22 Fed. Rep., 148), the Court said: "In the case now before the Court the plaintiff is in reality seeking to maintain the proposition that the realty he owned in Sac County in 1873 should be *freed from all taxation* for that year, because of the omission of the dollar mark as a prefix. It is not shown or claimed that the omission of the dollar mark in any way actually misled the plaintiff or prevented him from paying whatever sum was properly assessed upon his property. There is nothing in the evidence which would even tend to support the idea that if the dollar mark had been prefixed to the figures found in the columns containing the valuation and amount of the tax assessed on these lands, the plaintiff would have paid such sums." The same view is taken in many of the other cases heretofore cited. The ruling of the Court below to the effect that this tax was void, and that the same could be recovered back, merely because this dollar mark was not carried forward to the tax roll and warrant, *notwithstanding the same fully appeared on the assessment list*, and that this mere clerical error could not be cured by amendment, thereby allowing Haley to avoid taxation altogether, was a judicial absurdity.

VI.

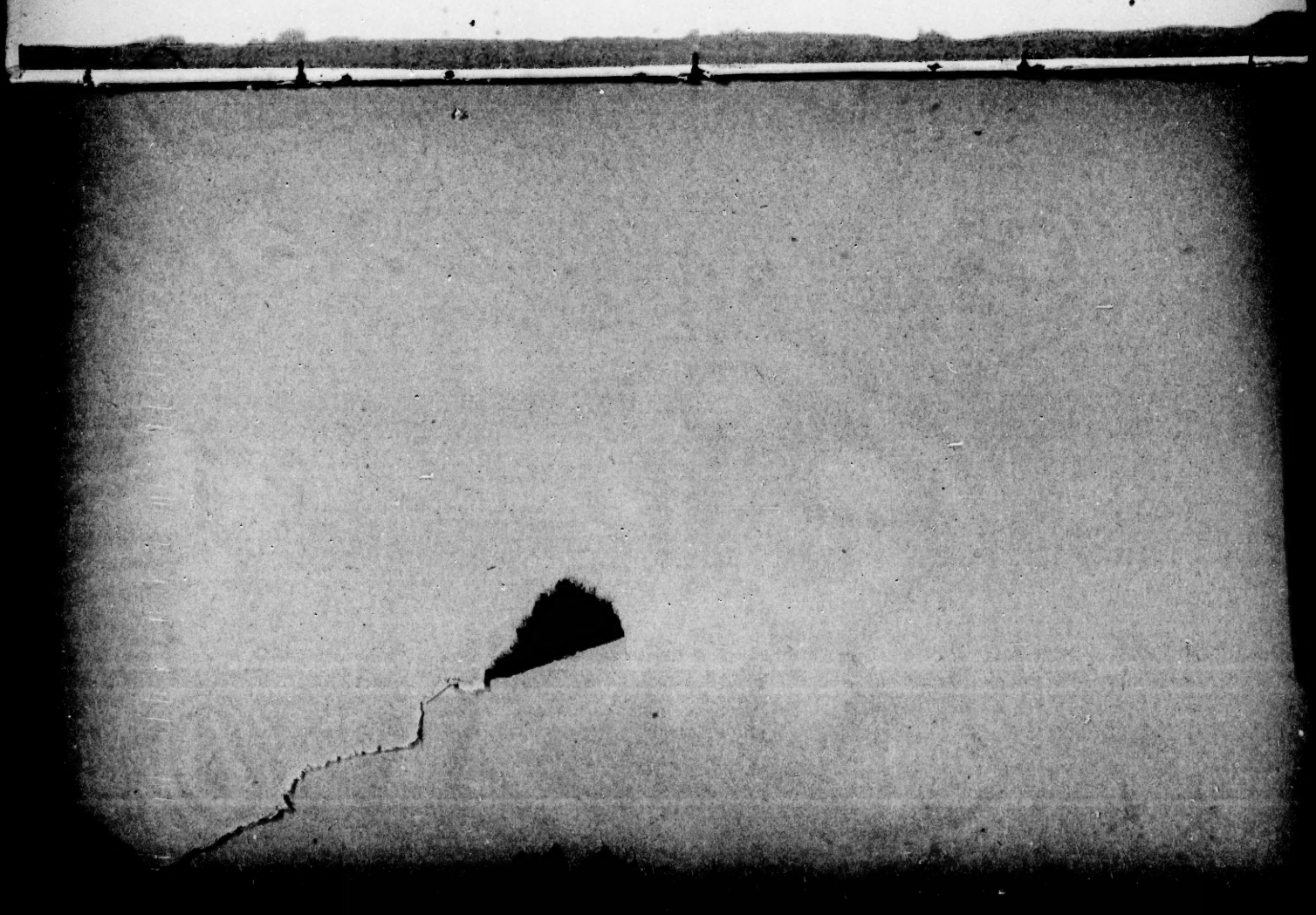
It remains to consider the ninth, tenth and and eleventh assignments, and these we will notice together. The only issue of fact submitted to the jury was whether these taxes were paid by the company or by Haley, and this was not *fairly submitted.* The Court made a rambling statement, as set forth in the ninth assignment, respecting what was or might have been in Haley's mind when he individually got the money to pay his taxes with;

as to the contention of defendant respecting the organization of the company being a mere pretense and sham, etc., but did not inform the jury that, if they believed such contention to be well taken, they could find for defendant; and thereby virtually withdrew the same from the consideration of the jury, and authorized a verdict for plaintiff, even though the jury may have believed that the pretended company was *organized and owned by Haley and the property fraudulently transferred to it for the sole purpose of bringing this action for his benefit.* This was in harmony with the refusal of the fifth instruction asked by defendant, and is made more apparent by the clause of the charge set forth in the eleventh assignment, wherein the Court, in effect, withdrew everything from the consideration of the jury except the question as to *who formally paid Mr. Haley's taxes.*

The Court, in that part of the charge set forth in the tenth assignment, improperly commented on the evidence in the cause. We do not question but that a Court may fairly comment on the evidence if, at last, the jury is expressly informed that they are the judges of the evidence and are not bound by the opinion of the Court respecting the same. But this discretion can be abused. When the Court becomes an advocate, it should stand for honesty and fair dealing. It should never espouse the cause of fraud. It should never attempt to defend or excuse perjury. When the Court said, "I do not see that there is anything extraordinary in this whole business," it *summed up the whole case against the defendant.* It expressed a comprehensive opinion upon the entire scope of the defense and did not *intimate to the jury that they were at liberty to take a different view.* It amounted to saying that the fraudulent transfer

of this property to Kinney; the perjured affidavits of Haley to the effect that the same belonged to Kinney; the sham transfer (if there ever was any transfer) of the property to a sham corporation, and all the frauds and impositions upon the Courts of Colorado and of the United States, after the validity of these taxes had been fully adjudicated by the Supreme Court of Colorado, which are disclosed by the evidence in this cause, *were all transactions which were in the ordinary course of business*, and that all contentions to the contrary, by counsel for defendant, were but *exhibitions of bad temper*. If counsel, in the argument of a cause, transcend the limits of legitimate forensic discussion, it is the province and duty of a Court to restrain them. But where a Court, in its final charge to a jury, deals in demagoguery, by assailing counsel or the manner of counsel—especially where, in doing so, it becomes thereby an apologist of fraud and a defender of perjury—an appellate Court should interpose, to the end that jury trials may be fairly and properly conducted. It is not conceivable that any jury could have found such a verdict as the one in this cause, had not the entire power and influence of the Court been exerted to bring about this result. In saying this, we are making no charge involving the integrity of the Court. The conduct of the Judge who presided can be explained upon the theory that he was so flattered by the effort of plaintiff and his counsel to seek the protection of his jurisdiction, that his eye was completely blinded to the infamous methods adopted to accomplish this result.

DANIEL E. PARKS,
H. B. JOHNSON,
Attorneys for Plaintiff in Error.



IN THE

SUPREME COURT

OF

THE UNITED STATES.

S. D. WILSON, TREASURER, ETC.,
Plaintiff in Error,

VS.

THE HALEY LIVE STOCK COMPANY,
Defendant in Error.

No. 14,384.

BRIEF OF DEFENDANT IN ERROR—PRELIMINARY CONSIDERATIONS.

The argument of this cause will be in two principal divisions. The first will be to call attention to the theory and grounds of recovery, and that these essentials are present. The second division will be

directed at infirmities of the defense. In each, however, we shall seek to make it prominent that the defense asks to be judged by cases—rules which if applied as he invites, would be absolutely fatal to him; it seems he must be judged by our or his own; if so a recovery must follow.

In stating the theory of recovery, and the elements present demanding it, we will state all that is material; limitations of this are the limitations of our brief. Beyond this no lawyer should go, or be permitted to go. Working from these views in the trial court, and developing the cause accordingly permitted the defendant to get before the court immense details of surplusage, and out of this he now seeks to create stumbling blocks of confusion, e. g. In his plea he hints upon the record three distinct defenses —and among these that he collected the tax in obedience to process delivered to him emanating from a tax roll—not any other process, yet in the conduct of his cause and in his argument, he seeks to inject into it a radical change; that he collected the tax not in obedience to process issued in Routt county founded upon records of that county, but that he did it "under directions of the Supreme Court" founded upon records of that court, the foundations of which they assume were laid in other and different counties than that of Routt county. The floating—ambulatory character of such defenses are inimical to consistent judicial proceedings, to that certainty required of pleadings—pleading a justification and showing that regular process required in taxation proceedings—that process issuing from inferior and statutory tribunals. Concentrated and definite argument around the record, and the changeful attitude with reference to it, is nearly impossible, *Sur-*

plusagium non nocet: (Surplusage does not vitiate), does not apply here. Overloading a record with irrelevant details, is most serious, as this court has repeatedly stated.

Defendant Wilson has given much space in his argument to an attack upon the plaintiff corporation; this is not warranted under his denials. Pleadings shall be true, has no application to him. Upon a court's records, the highest evidence known to man, he steps forward and deliberately denies that the corporation is the citizen of another state, or that it exists at all, and upon this they trample under another equally great rule, i. e., that fraud must be specifically pleaded. If the incorporation of the plaintiff were fraudulent, it was but just that the plaintiff should be apprised that such an attack would be made at the trial. But to deny upon the court's record the citizenship of the corporation, and that it existed, and then at the trial insist that it was incorporated, was a citizen of another state, but that it was incorporated with a bad motive—intent, and to secure for itself and its successors the benefits of protection from the federal judiciary, and that in this consisted an evil, illegal and vitiating element, was certainly a departure in pleadings—a violation of first principles of morality in procedure, and an attempt to make a defense out of insubstantial matter. So viewing this position and this defense item at the trial, the defendant was permitted to proceed with a free rein and to mix and spread his colors as he pleased. We firmly believe that the true practice before able courts is to clearly distinguish between material and irrelevant details, giving all attention to the former, and no unnecessary attention to the latter, but leave these to the competent and intelligent

directions of able judges. So, too, we were contented to leave the question about whose money was paid.

One thing is sure, it was either the company's or Haley's; the latter swore it was the company's, and that it was applied to its use and benefit. In such dealings this ought to be sufficient.

The evidence shows that perishable property, beef cattle, were mischievously seized, and were held to vex, harrass and injure, and that to secure a release of these, the money was paid. *Res ipsa loquitur* (the thing speaks for itself.) In the face of these facts it was needless to use any round terms of "duress," "coercion," "extortion" and "forcible trespass," which is an indictable crime, and which might have lawfully been resisted to any extent in this case. But we believed we would be given another remedy.

Sasportas vs. Jennings (1795), 1 Bay, (S. C.), 470; S. C., Elwell's L. C. Inf. Id. & Cov., 782, ext. notes.

Spaids vs. Barrett (1870), 57 Ills., 290; S. C. 11 Am. Rep., 10.

Lafayette, etc., R. R. Co. vs. Pattison (1872), 41 Ind., 312.

If no tax was due, then duress was committed in the most aggravated form. Money paid under duress is never voluntarily paid. At pp. 14-15 (20) is the receipt for the taxes which acknowledges the money was paid "under protest." This ordinarily would operate as an estoppel in itself; but above and beyond this, the money was paid from a certain and given condition shown by the evidence, which shows an indictable crime at common law, duress in its most aggravated form, and extortion by an officer upon "doctored" process; any one of these elements

under the decisions of this court affords grounds of recovery. Observe in the face of that receipt and the indisputable facts shown by the evidence, defendant Wilson, upon the court's record alleged the taxes were voluntarily paid. This is one of his three distinct defenses made up of nothing more than bald conclusions of law. Man has no right to misrepresent anywhere, much less upon a court's record. We think the facts we have, and shall further call attention to, shows that the defense will make any representation, will similate, fabricate and pretend anything which can possibly be distorted into the semblance of a defense.

In connection with the last statement comes to our mind the irrelevant pretences involving fraudulent conveyances. Why every lawyer knows, *Assignatus utitur jure auctoris* (an assignee is clothed with the rights of his principal; stands in the shoes of his principal.) Here was a herd of cattle, speculative property through a series of years, and the business operations of the owner, his dealings, usual ones for the condition shown by the evidence, are unearthed at the trial, as though fraudulent conveyances were made to defeat creditors—a tax—a lien *in rem*, and the coloring spread on that this was done to cheat a tax creditor. We treated this at the trial as we did the irrelevant talk about the fraudulent incorporation, and the other frauds; not one of these were pleaded, therefore we were not given an opportunity to meet them, therefore it was irrelevant to meet them—it was needless labor to marshal and present the testimony until we had notice that it would be deemed material, and that this feature, or these features would be superadded to essential grounds of recovery. To fully deal with every

chimera dreamed out and set up to defeat a recovery in this cause, would constitute a large volume. However, we deem it apropos to roughly call attention to a few more of these as it may be justifiable to do so in reviewing the essential facts of the case, which, if carefully noted, will show that the court could not rightly accept the wild and scattered theories of defendant vehemently pressed with untiring determination. No serious attack upon substantial grounds of recovery should be recognized, when the sole staple of that attack is surplusage and unwarranted assertions. To properly judge of these, we will next set out the grounds of recovery.

THE FOUNDATION OF RECOVERY; DEFENSES OF THE JUDGMENT.

Money had and received will lie for the recovery of a void tax at common law.

Town of Lynde vs. Melrose, 10 Allen, (Mass), 49.

Chapman vs. City of Brooklyn (1869), 40 N. Y., 372-380.

Peyser vs. Mayor, etc., (1877), 70 N. Y., 497.

Burroughs Taxation, 440.

Cool. Taxation, 566.

A statute in Colorado expressly allows such recovery.

Hurd vs. Hamill, 10 Colo., 174.

The tax in this case was void; its foundation was the tax roll p. 101 (139)—the grand roll—the assessment roll of record, and made of record by the assessor and passed upon by the board of equalization, sec. 2875, General Statutes Colorado, 1883.

This is the judgment for taxes in Colorado, and the judgment for taxes must be certain.

Lawrence vs. Fast (1858), 20 Ills., 338; S. C., 71 Am. Dec., 274. This case has never been overruled. In Illinois, Breeze, J., dissented, and held that the two right hand figures must be read as cents, that "2.48" meant two dollars and forty-eight cents, upon the broad principles; First—*Ut res magis valeat quam pereat* (that the thing may have validity sooner than be lost). Second—*Certum est quod certum reddi potest* (that is sufficiently certain which can be made certain); and Third—That in such proceedings the construction should be beneficent for the taxpayer; and following this dissenting view is State vs. Eureka Min. Co., 8 Nev., 15; and following and citing this last case is Sawyer vs. Gleason, 59 N. H., 140; Cahoon vs. Coe, 52 N. H., 518, 524; Jenkins vs. McTigue (1884), 22 Fed. Rep., 148, 152, sets out a roll. Here the numerals were held certain because the Iowa code declared the three right hand figures should read cents and mills. Looking from the statute, *Certum est quod certum reddi potest*, was applied. This last case would make the assessment roll p. 101 (139),. read $175.100.

Chamberlain vs. Taylor (1885), 36 Hun. (N. Y.), 22, 30, 31, also involved the statute similar to Jenkins vs. McTigue. It follows the dissenting opinion of Breeze, Judge, in Lawrence vs. Fast; also State vs. Eureka Min. Co., supra. It also follows American Tool Co. vs. Smith, 14 Abb. (N. C.), 378; 32 Hun. 121. Ensign vs. Barse, 107 N. Y., 329, rests on American Tool Co. vs. Smith. In State vs. Eureka Min. Co., supra, the form of the statute was followed. There was a perfect description of lands, and the two right hand figures were made to read cents. Apply the

doctrines of these cases which are cited by defendant, p. 25 of his argument, and the assessment in this case would read $1,751.00. Upon this assessment the collector was claiming more than seven times as much tax—this in the regular process the defendant held up in our U. S. Circuit Court. Apply the other case he cites, Jenkins vs. McTigue, and it is worse yet.

Elston vs Kennicott, 46 Ills., 202, Breeze, J., expressly cites Lawrence vs. Fast, cites it with approval and explains it and its application, and that it in Illinois applied to the judgment for taxes. This explains Chickering vs. Faile, 38 Ills., 342; Eppinger vs. Kirby, 23 Ills., 521; so we see Lawrence vs. Fast has not been overruled in Illinois; if it were, however, and the dissenting opinion of Breeze, J., were latterly adopted, we are content, for the reason that such a construction is perfectly fatal to the regularity of defendant's process. All these Illinois cases are cited and relied upon by defendant.

The judgment for taxes must be as certain as any other judgment, for *Ubi eadem ratio ibi idem jus* (like reason doth make like law.)

1 Black Judgments, sec. 118.

Freem. Judgments, sec. 48.

Carpenter vs. Sherfy, 71 Ills., 427, sustains Lawrence vs. Fast, is a re-affirmation of it; the *rationale* involved is just the same. If one judgment must be certain, so must another, for "things equal to the same thing are equal to each other."

Defendant cites other cases: Hopkins vs. Young (1888), 15 R. I., 48, 50: cases. Held: the whole roll will be inspected, and if between its four corners its meaning can be gathered, this is sufficient; *Certum est quod*,

etc.; it also holds two right hand figures stands for cents.

Collins vs. Welch (1887), 38 Minn., 62, is in line with Elston vs. Kennicott, supra. The judgment for taxes was not there involved, only the publication notice. This case cites Eppinger vs. Kirby; Chickering vs. Faile, supra. Circumstances alter cases, *Cessante ratione legis cessat ipsa lex* (Reason is the soul of law, and when the reason of any particular cases, so does the law itself).

Ward vs. County Board, etc., (1892), Mont.; S. C., 29 Pac. Rep., 658. Here an assessment roll is set out with columns for dollars and columns for cents. This roll was like State vs. Eureka Min. Co. In compliance with the statute and there was applied to it *Certum est quod, etc.* But the roll, p. 101 (139), record is not in compliance with state statute, sec. 2865.

New Orleans vs. Day (1877), 29 La. Ann., 416, 417, alone can in reason and from any legal standpoint be claimed by defendant. But it expressly states that it rejects the cases from Illinois and Tennessee for local reasons. It cites no cases, makes no extended dicussion or review of the subject, makes no recognition of the element of certainty in judicial and tax proceedings—a case burdened with such infirmities ought not to weigh for much.

Lawrence vs. Fast applies to all judgments for money demands as we have shown, and in substance this in Colorado is what we are addressing ourselves to, and re-inforcing our position, is another case of great weight, for it involves a case where the description of lands was like the case at bar, and where, too, the "$" mark was omitted.

We refer to:

Tilton vs. Railroad Co., 3 Saw., 22.

Woods vs. Freeman, 1 Wall (U. S.), 398.

Braley vs. Seaman, 30 Calif., 610.

People vs. S. F. Savings Union, 31 Calif., 132.

Tidd vs. Rines, 26 Minn., 201.

Randolph vs. Metcalf, 6 Cold. (Tenn.), 400.

Welty on Assessment, Sec. 225.

Burrough Taxation, 230.

Sec. 2865 Gen. Stat. Colo.

Lawrence vs Fast, accords with that strict rule of construction, applicable in taxation: Every presumption against inferior and statutory tribunals,

Piper vs. Pearson (1854), 2 Gray, (Mass.), 120.

S. C., 2 Lead. Crim. Cas., 304.

S. C., 61 Am. Dec., 438.

Mech. Pub. Off., 619, 630, 632.

Crepps vs. Durden, 1 Smith's Lead. Cas. notes.

Runkle vs. United States (1886), 122 U. S., 543.

Gomer vs. Chaffee (1882), 6 Colo., 314, 315.

As we shall see, assessing is the act of a constitutional official—is a *quasi* judicial act; this may be done so carelessly as to be wholly unintellibible, so uncertain as to be void, and under the above authorities such was the case here, p. 101 (139). Certainty is an essential element in pleadings, constitution of all records, of all judicial work. Jurisdictional acts lacking certainty have applied to them, *Debile funda-*

mentum fallit opus (Where the foundation fails all goes to the ground). Cases denying this and what we shall further observe of the assessor and his constitutional functions are not authentic. From this standpoint, argument is certainly inadmissible, that the constitutional functions of the assessor may be usurped and discharged by other persons at other times, at other places, and not in the manner nor upon the records specifically provided for the exercise of the assessing power, Marbury vs. Madison.

Powers vested by a constitution in designated officials cannot be exercised by other and different officials.

People vs. Maynard (1855), 14 Ills., 420.
Mech. Pub. Off., 514.
Dennett vs. Petitioner (1851), 32 Me., 508.
S. C. 54 Am. Dec., 602, note.
Newland vs. Marsh (1857), 19 Ills., 376.

Curative statutes only apply to immaterial error, not material error, or nullities.

People vs. Seymour (1860), 16 Calif., 332;
S. C. 76 Am. Dec., 521, extended notes.

Curative statutes stand similar to legislative enactments, about formally defective pleadings and proceedings; these have no reference to void pleadings, nullities; there is a wide distinction between irregularities and nullities.

A tax list is not a record; it is a loose paper received of, or delivered by the assessor. See p. 26, Wilson's Argument, secs. 2835-2838, statute.

The tax list, pp. 20-22, is not a record; at most it is no more than a summons or citation in judicial

proceedings; it is but an aid in making the tax roll—the grand roll—the record, p. 101 (139). Defendant admits this, p. 26, Argument. This tax roll when perfected by the Board of Review, is a record; loose paper and memoranda is not a record as contended, p. 26, argument.

1 Desty's Tax., p. 607.
Cool. Tax. 751-752, 3d Ed.

A tax list will no more support a tax than a mere summons will perform the office of the judgment record. To show a tax, a tax list will not do, a record—the tax roll revised and perfected by the Board of Equalization—the Board of County Commissioners in Colorado, alone will show a tax. The county clerk and recorder is the keeper of this record, and he alone can certify to the document which shows and supports a tax judgment. The only roll—record, introduced in this case is at p. 101 (139). The tax list, pp. 111-120 (157-165), is mere surplusage, and was properly so treated by the trial judge. It can only be noticed by this court as hinted in R. R. Co. vs. Stewart, 95 U. S., 284.

From a tax roll—a grand roll, the record is made another list—a secondary or derivative list, the collector's process, which has fixed to it the precept or process, commanding the treasurer to collect taxes, all of which is delivered to the county treasurer (the collector) in Colorado. This, so to speak, is the final process in tax proceedings in Colorado. See pp. 20-21 (28-29.)

It is important to keep clear and distinctive views of the assessor's list, the tax roll—grand roll—the record and the treasurer's list made from the grand roll with the precept attached constituting

the process; hence, we have particularly specified them. Defendant does not make and keep clear these differences.

Recovery was had upon the theory that if the assessment roll—the record, p. 101 (139), was void, that then such a tax must be refunded. Such has long been the law of Colorado. Hurd vs. Hamill (10 Colo., 174, 175), involves the history of such a refunding. This is not a clearly reported case; it however shows such refundings are allowed; of course grounds therefor could not be stronger than that a tax is void—that it rests on no sufficient record; such were the facts in that case. Without a sufficient record it is exactly similar to the claim of a judgment without a record; of course, a record cannot be supplied by acquiescence—estoppel *in pais*, or conduct about the thing. There is a wide distinction between estoppels of record, and estoppels in *pais*, or equitable estoppel. Public policy demands the existence of a record to rest a tax or a judgment upon. But about these views, plaintiff and defendant widely differed; the latter most charily accepted the views of the court upon these points. The court had to accept one theory or the other, however offensive its necessary election must prove; the mere exercise of this election, calmly and dispassionately stated, and consistently and intelligently adhered to proved the cause of a heated contention, the defendant carries into this court; he states his reasons for that contention, and we shall try and state the other view.

Defendant Wilson was necessarily forced to one of two defenses:

First—That a tax was due.

Second—And if not due, that he, as a ministerial officer was protected by his process under the doc-

trines of the great cases, Savacool vs. Boughten (1830)), 5 Wend. (N. Y.), 170; S. C., Bige. L. C. Torts, 241; S. C., 21 Am. Dec., 138, and Grace vs. Mitchell (1872), 31 Wis., 533; S. C., 11 Am. Rep., 613.

Erskine vs. Hornbach (1871), 14 Wall. (U. S.), 613, 617.

Haffin vs. Mason (1872), 15 Wall. (U. S.), 671.

Looking from the facts as we will, a justification of the record was demanded from defendant Wilson. His defense, such as it is, is found at pp. 2-3 (4-5). The necessary defense matter is nothing more than pure conclusions of law. (We forbear citing authorities condemning these.) His defense must be found in these words, and nothing else: "That defendant was in substance commanded to make the sum, etc." This is bad under all systems; it avails nothing; out of this can we find essential facts for a plea of justification? He does not set his process out; he pleads no facts; his plea, if anything, is: 1—That a tax is due without setting forth any essential, which is necessary under all systems of pleadings to show a statutory fact.

Russell vs. Mann (1863), 22 Calif., 132.

Williams vs. Hingham Turnpike Co. (1841), 4 Pick. (Mass.), 341, 344.

United States vs. Morris (1825), 11 How. (U. S.), 246, 282.

2—A pure conclusion of law for his justification under process.

Savacool vs. Boughten, supra.

Gelston vs. Hoyt (1818), 3 Wheat. (U. S.), 246, 326-328.

3—Also *Volenti non fit injuria*—That the trespass was invited or assented to—that the money was voluntarily paid. Here are three distinct defenses; this plea is at variance with all rules, and also many decisions of this court which requires pleadings to be single, certain, not too broad or ambulatory or faulty for duplicity. This plea is also vague and equivocal; it is bad even after verdict.

Notes to J'Anson vs. Stuart, 2 Sm. Lead. Cas., 987-1001.

Taylor vs. Cole (1789), 3 Term Rep. (Durn. & East), 293; S. C., 1 Sm. L. C. 1346-1359. Notes.

The plea is equivocal because it is as referable to one thing as much as to another; such a plea is necessarily bad when the position before the court is that the record from which such process emanates is defective.

Tilton vs. R. R. Co., *supra*, shows the roll is defective.

Supposing process issuing from that record has been "doctored" until it is valid—if the grand—the mother roll is void, then the "doctored" process is valid, so we would have valid process describing a void roll—nothing. Valid process founded on a void record. Such results are best argued upon a mere statement; words weaken the position.

A plea of justification where specified facts must be pleaded, which is "flesh, fish or fowl," according to the appetite of the lawyer who sets the dish before the court, ought not meet with acceptance.

Requirements of pleas of justification may be gathered from:

Gelston vs. Hoyt, supra.

Notes to

J. Anson vs. Stuart, 2 Sm. Lead. Cas., 987-1001.

Mitchell vs. State, 12 Ark., 50; S. C., 54 Am. Dec., 253.

Wade vs. Chaffee, 8 R. I., 224; S. C., 5 Am. Rep., 572.

Mure vs. Kaye, 4 Taunt., 34.

Boynton vs. Tidwell, 19 Tex., 118.

Berry vs. Hart, 1 Colo., 246.

The process was, however, introduced in evidence, pp. 104-105 (145-147), and upon its face shows there are no description of lands (Tilton vs. R. R. Co., 3 Saw., 22); yet upon these lands he was collecting a tax—collecting void items—this vitiates:

Eames vs. Johnson, 4 Allen (Mass.), 382.

LeRoy vs. E. Saginaw R. Co., 18 Mich., 233; S. C., 100 Am. Dec., 162.

"Six 1-4 of land" without section, township or range, is a void description. All the lists, rolls and records describe the land in this way, and not otherwise.

Collecting a tax on such a description—no description—nothing, constitutes the collector a trespasser *ab initio.*

Six Carpenter's Case, 1 Smith's Lead. Cas. Notes.

Malcolm vs. Spoor, 12 Met. (Mass.), 279; S. C., Bige. L. C. Torts, 378.

S. C., 46 Am. Dec. 675.

Again, if the construction of State vs. Eureka Mining Co. and like cases elsewhere noted is accepted as invited, then, too, this doctrine must be applied.

Here are broad and well-established grounds for recovery.

In no case can a tax on land be collected off personality. Taxes are a lien *in rem* in Colorado.

Regularity of process is necessary to protect a tax collector.

Cool, Taxation, 800, 3d Ed., cases.

Mech. Pub. Off., 690.

1 Dill. Munic. Corp., 237, note.

Void process is no defense.

State vs. McNulty (1852), 34 Me., 210; S. C., 56 Am. Dec. 650, note.

This process upon its face was void for several reasons, which we have, and will further specify.

Curative statutes cannot render nugatory—nullify, constitutional provisions. People vs. Seymour and notes, supra. In Colorado an assessor is a constitutional officer, and he must assess; the constitutional officer alone can assess.

People vs. Hastings (1866), 29 Calif., 449.

People vs. S. F. Savings Union, 31 Calif., 132.

The assessor and board of equalization make the assessment roll—record—the grand roll, lodged with the county clerk and recorder; it constitutes liens on lands, and therefore must be kept in the right office for this purpose. Any curing of the tax must be of this record, the mother roll—the roll made by the constitutional officer, for making it to-

gether with the board of equalization, *Expressio unius est exclusio alterius*—the great case of Marbury vs. Madison, applies here; this great "polestar" will not make the argument admissible that the process —treasurer's (collector's) tax list, emanating from this record, may be corrected and revised, "doctored" —altered—forged, to make the process "regular," and that by making the process "regular" on its face (granting such was done for a moment only) that this would validate the tax, and that these changes by the collector of his process, would protect him from trespasses committed. Argument for a curative statute must apply it to the original roll, and not the collector's list—the process. If the original roll is void, then we have the collector *ad libitum* and arbitrarily making a tax due—excluding the functions of the constitutional officer and the Board of Equalization such powers, dispense with the constitutional assessor. This view, too, we wish to submit upon a mere statement of it, for the best effect. *Argumentum ab inconvenienti plurimum valet in lege.*

Bro. Max., 184.

Aider by verdict or pleading over, never supplies the absence of material allegations.

Reg. vs. Waters (1848), 1 Den. C. C., 356.
S. C., 2 Lead. Crim. Cas., 152, notes.
Reg. vs. Waverton (1851), 17 Q. B., 562 (79 E. C. L. R.).
S. C., 1 Den. C. C., 365.
S. C., 2 Lead. Crim. Cas., 152.

The *rationale* involved here equally applies to the powers claimed for curative statutes, which do not contemplate that an absolutely void roll shall

be made valid, much less that the whole, the entire foundation of the tax, shall be made valid by the collector "doctoring" his process, and this by some kind of relation extending back and validating the assessor's roll, made and lodged as elsewhere stated. From this view, *Debile fundamentum fallit opus* (where the foundation fails all goes to the ground.)

There can be no parol levy of taxes; they depend on a record, rightly made, made by the right officials.

Moser vs. White, 29 Mich., 59, 60.
Appeal of powers, 29 Mich., 504.
Iverslie vs. Spalding, 32 Wis., 395.

Intendments are against it, and this record is presumed against.

Polk vs. Rose, 25 Md., 153.
S. C., 89 Am. Dec., 773.
Keane vs. Cannovan (1863), 21 Calif., 291.
S. C., 82 Am. Dec., 738.

Process must have come into the collector's hands with regularity upon its face.

Henry vs. Bell, 75 Mo., 194.
Leachman vs. Dougherty, 81 Ills., 324.

The process in this was altered, materially altered, and this was known to the collector before he executed it. See John A. Coulter's testimony, p. 93 (129-130). This fact was fully proved. Curative statutes do not authorize making valid out of void process, we have above stated.

People vs. Seymour, and notes supra.

The process in this case was gradually evolved by material and premeditated alterations, pp. 20-29

(27-48). Bear in mind this process emanated from the assessment roll, p. 101 (139); like an execution, it must conform to the record from which it emanates; it must describe that record; but a void record is not described in valid process. Curative statutes do not contemplate this.

Above and beyond the mischievous forgeries developing the process, is the fact that the defendant was selling personal property to pay a tax due on real estate, granting for a moment only some real estate was described for taxation. This, too, vitiates the regularity of process.

Looking at defendant Wilson's plea, the questions are: 1. Did he plead a justification, did he set out essential facts?

> Gelsten vs. Hoyt (1818), 3 Wheat. (U. S.), 246, 326-328.

2. Granted he pleaded it, did he prove it? These are important questions, and they deserve more attention than the collector has devoted to them.

> Simonton vs. Winter (1831), 5 Pet. (U. S.), 141.

Having shown: 1, There was no tax due; 2, That the process was irregular and void, plaintiff presents ample grounds for recovery unless for some reason in procedure, his judgment should be reversed.

From such grounds of recovery, alleged, proved and found, and a judgment entered and founded thereon, it devolves upon plaintiff in error to point out prejudicial error, more than mere harmless error to reverse the judgment.

ERRORS ASSIGNED TO REVERSE THE JUDGMENT.

1. The practice of defendant Wilson in developing the record to rest this assignment on, might be given a short and round name. However, we will deal strictly with the record facts, and allow this court to judge and to name that practice, which should have the spirit of Oscanyan vs. Arms, 103 U. S., 261, applied to it. In the motion for a new trial, p. 148 (203), are grounds to found the statement that all of the record in this case is not present; that the praecipe for the preparation of the record omitted matters touching the first assignment of error. From the first and second grounds for a new trial, p. 148 (204), and what the court stated to defendant, p. 123 (169), the fact, however, appears that defendant Wilson had tried to sustain a plea of *res adjudicata*, which must be pleaded in Colorado.

Hax vs. Leis, 1 Colo., 187.

Breeze vs. Haley, 11 Colo., 351, 353.

This last case is a precedent—authority for the essentiality of a record "setting out a copy of the complaint, the steps taken, and a judgment" to constitute that plea. It was upon those things the court proceeded, it informs us. And in an equity case this appears to be the rule.

Bank U. S. vs. Beverly, 1 How. (U. S.), 135, 151.

And this is the general rule under codes.

Freem. on Judgments, sec. 284.

McLaughlin vs. Kelly, 22 Calif., 212.

S. C., 7 Mor. Min. Rep., 444.

Codes imperatively demand that new and affirmative matter be pleaded. Under code systems this legislative command is everywhere enforced, and the same rule applies in criminal procedure.

1 Bish. Crim. Law, 814, 3d Ed.

Even an equitable estoppel must be pleaded in Colorado.

DeVotie vs. McGerr (1890), 14 Colo., 577.

And consistently so, for *Allegans contraria non est audiendus* is the basis of both kinds of estoppel, and each is a species of fraud. The idea of all estoppels is to conclude the truth as a punishment for one having acted inconsistently, having done contrary things. However, the rule is a harsh and odious one, and is disfavored. Therefore, one seeking to apply such results, must show himself strictly entitled to them. He must present and keep present his record. The facts and circumstances constituting a fraud must be pleaded, not conclusions of law; and so it is with equitable estoppel and a *fortiori* with estoppels of record. About these requirements contention was stirred and which may be gathered from the pages last above referred to, and the defendant's argument. After repeated efforts to plead a plea of *res adjudicata*, and vain insistence that incomprehensible opinions from the official reports should be accepted as a plea, we have the whole scheme abandoned at pp. 122-123 (168-170), where the alleged records are expressly offered to aid the assessment roll upon the ground of acquiescence for previous years in alleged similar assessments.

Oscanyan vs. Arms should apply here; in this case no room was allowed for inconsistencies.

Here was proposed such an extension of *Res inter alios, etc.*, which the court hastened to repudiate, as shown by these pages of the record. The counsel expressly disclaimed offering those records to affect the pretense of a former adjudication. We quote from the record and counsel's words: "We could not make the technical plea of *res adjudicata* upon that view; but we offer it for this purpose to show:

The Court—You could have made a very different plea from what you did.

Mr. Johnson—We do not offer this to support any plea now or upon that theory now. We merely offer to show the authority, so far as the decision of the supreme court can go, directing Mr. Wilson to collect this tax; the construction of this roll and the finding upon these other papers that are now going before this jury, that it was the duty of the treasurer to go on and collect the tax; to show that he virtually collected the tax under the direction of the supreme court of the State, and upon these very rolls."

Here we also find an objection made by plaintiff that the tendered records upon their face show that there was never a final hearing in any court upon the merits of the case; that the only hearing ever had was before judges at chambers on a motion for a dissolution of an injunction, etc.

This record shows that the decisions of the supreme court were offered, *Expressio unius est exclusio alterius.* These were properly rejected.

Northern Bank vs. Porter Township, 110 U. S., 608, 615.

Opinions of courts—reasons for a judgment have nothing to do with showing what was adjudi-

cated for reasons involved in the case last cited. Also in Cohens vs. Virginia, 6 Wheat. (U. S.), 399; Uhfelder vs. Levy, 9 Calif., 608, 615. These authorities dispose of opinions for *res adjudicata* purposes. Now, bearing in mind this offer at the trial followed repeated attempts and failures to set out the essentials of a plea of *res adjudicata*, we certainly have the defendant defending himself from an application of *Allegans contraria non est audiendus*. Read his offer of the record of a "schedule of 1883." This in fact was the tax list, not the assessment roll, and he offered this "schedule," a loose and isolated paper—mere memoranda to show the circuit court of the United States that "six quarter sections" was a good and sufficient description of lands, and following this extraordinary proposition, and in connection with that, he offered alleged judicial records purporting, as he said, to give the history of antecedent litigation, and for what purpose? Certainly for those he expressly stated, to wit: to show "six quarter sections" was a good and sufficient description of lands. *Expressio unius est exclusio alterius*, also applies here. He also expressly told the court that all these documents were offered together, including the opinions of the court, and that these were not offered to prove former adjudication. *Expressio unius,etc.*, also applies here. If such a mass of memoranda, loose paper, record matter and decisions—opinions of court were offered to prove a former adjudication, it should have been refused, if for no other reason than for those involved in Railroad Co. vs. Sewart, 95 U. S., 284.

It must be observed that this heterogeneous jumble—this confused and mingled mass of documentary evidence, consisting of loose memoranda,

record matter and opinions of court, has not been preserved in the record. This court cannot judge of its weight and sufficiency, not even the substance of it is here. Error must affirmatively appear every presumption—every intendment is in favor of the judgment below until the contrary is shown. It is not because counsel disliked surplusage that the documents offered are not present. See pp. 111-122 (158-167), this record. It must have been upon the idea that such an offer would not prove advantageous that it was omitted. Counsel also assume that, notwithstanding the opinions, the decisions were rejected, that nevertheless they can deal with them as admitted and as conclusive. These positions are untenable. If they can be judicially noticed and are conclusive, why offer them in evidence, and assign error to their rejection by the court? Some inconsistency here.

The ground stated, p. 123 (169), and of which we hear so much, in the argument that the tax was collected under the directions of the supreme court, when the record shows that they collected upon "doctored" process emanating from an assessment roll—record, p. 101, is preposterous. Defendant ought not be permitted "to blow hot and cold."

Elsewhere we have observed that a constitutional officer must assess, and that if he fails in assessing, *Debile fundamentum fallit opus*, applies. Therefore, the command of the judicial department of state would be, in sound law, a mere *brutem fulmen*. Moreover, if the collection was made upon the directions of the supreme court, process must have issued upon those directions, and must have conformed with them; and if so, a justification should have been pleaded. But they pleaded this defense "that

by said tax list and warrant, said treasurer was in substance commanded to make said sum, etc." This is what they pleaded, not that they did it under the directions of the supreme court of the state. *Expressio unius, etc.*, also applies here. Having alleged why they collected the tax, they should be held to that ground, else their plea is fatally defective.

Defendant's argument teems with a defense of the supreme court of the State, and abuse of every trial judge who ever looked into the record, and they tell us these are many, and these judges, notwithstanding what is charged of contempts, etc., refused, after notice to dissolve injunctions in vacation, to do so; after it must have been explained to them that contempts, if any, had been committed. Naturally upon such a roll, appeals were made for protection; upon every consideration of the record it has been afforded. After all this, these trial judges uniformly refused to dissolve the injunctions. Under a statute appeals were taken from these interlocutory orders made by judges at chambers in vacation, and upon these the opinions cited are founded. No effect can be given the opinions offered in evidence and rejected, and omitted from the record, therefore not present in the record for discussion. When they are we can fully dispose of them consistently with a just and proper recovery. Their insufficiency as a plea of former adjudication must be tested by more than a dozen rules, needless now to mention.

We beg to state that in no jurisdiction are contempts so easily incurred, and are so strictly adjudged as in Colorado. Why, litigants are not allowed to state their reasons for changes of venue, was a last decision.

People vs. Hughes, 5 Colo., 536.

This was after a former decision to the contrary, and notwithstanding the supreme court is limited by the constitution to original jurisdiction of specified

cases, not including trying of attorneys for disbarment, yet where attorneys were arraigned for making false and malicious allegations to give a case a standing upon a record, their conduct was so exasperating that the supreme court resolved itself into a trial court and amplified its jurisdiction and originally heard and determined the charges, and found that the charges were false and malicious, and disbarred the attorneys.

People ex rel vs. Green and Johnson, 9 Colo., 506, 535.

The forum ~~when~~ where committed is the place to complain of contempts. We should make no defense elsewhere; contempt jurisdiction is large, and effective in Colorado.

Defendant fails to inform this court the reason why successive judges were applied to, was because Routt county, by different legislative acts, was made a part of different judicial districts, and that this reason and changes in tenure of office, made it necessary to apply to different judges. Explanation is ready for all the charges made, but here is no right or proper place for mischievous, unwarranted and irrelevant details.

A serious impeachment of the supreme court of Colorado is made by defendant in charging that the court, by usurpation, directed the tax collected, held the description of lands good, and ordered personality sold to pay taxes on land; that the court could do the work of the assessor. That upon its records the process really issued and was enforced. We know of nothing worse ever intimated of any court—nothing more contemptuous could be said; not even the matter involved in People vs. Green and Johnson, 9 Colo., 506, 535. This case affords an instructive example of the freedom assumed by counsel in dealing with facts and incriminating courts, whenever an opportunity is presented.

Duchess of Kingston's Case, 2 Smith's Lead. Cas. (8th Ed.) made prominent the former rule, that to be conclusive a former adjudication must be both pleaded and proved; also formerly held that the demands of *Interest republicae ut sit finis litium* made the record admissible in evidence if not pleaded. However, in such case it was not conclusive—the jury was not bound to give effect to it unless it were pleaded. But this rule is abrogated under codes, as elsewhere observed.

Freem. Judgments, sec. 284.
Hax vs. Leis; Breeze vs. Haley, supra.

Viewing the offer of the record, as it was offered, for the purposes it was offered, defendant cannot successfully claim that he was within the doctrines of Duchess of Kingston's case, nor within that of code procedure, nor the Colorado decisions, nor that mentioned in Bank U. S. vs. Beverly, 1 How. (U. S.), 135, 151. He was presenting a record involving equitable jurisdiction—a matter of equity where the facts are specifically pleaded, and when so, essential record matter, averring ~~owning~~ and denying facts, must be pleaded, and it must speak for itself.

Rejection of the record, if error, was waived, the point next having been saved in the motion for a new trial; this contains nothing that can save the point, and if waived there, then it can not be revived in the assignment of errors, the purposes of a motion for a new trial will not allow this.

The general assignments of error about admitting and rejecting of improper and proper evidence, is naught. Such specifications in motions for new trials and assignments of error, are too indefinite.

In this is additional reason why the first assignment of error is untenable and must be treated as waived.

The *rationale* of *Consensus tollit errorem*, Bro. Max., 135, 139, demands that, one be apt, full and fair in making his objections and in stating his positions, (see Record, p. 122 [168],); and that a motion for a new trial be made, to afford the trial court an opportunity to correct his errors. Therefore, matters omitted therefrom are waived, if waivable in character. "He who does not speak when he ought, shall not be heard when he desires to speak," is the rule.

Overruling the motion for a new trial was not error.

Terre Haute, etc., R. R. Co. vs. Struble (1883), 109 U. S., 381, 385, cases.

Finally: Believing we have accomplished the undertaking we stated in the opening—that we have made tangible, broad and ample grounds of recovery —that all errors, if any, are harmless or waived, we have but to add:

In the established facts is found a reply to the attacks upon judges, litigants and counsel. These attacks depend upon collateral facts which are not established, and which we have had no opportunity to meet, deny or explain. We cannot make them relevant by assuming their existence, and then discussing them here. Judge Hallett needs no defense; the law of his court is stable, reliable, permanent; protection there is certain. These facts are not in peril and cannot be imperilled; his life's record shows he has been devoted to giving that protection which the able and upright judge alone can give—that he has strengthened the name of "Government" among men. States have had their Kents, Gibsons, Cooleys,

Dixons and Fields; what these men were to their states—what John Marshall was to the Federal Government, Moses Hallett has been to Colorado.

Respectfully submitted,

W. T. HUGHES,

Attorney for Defendant in Error.